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# Calumnious News Reporting: Defamatory Law Is More Than Sticks and Stones for Civic-Duty Participants

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Calumnious News Reporting:  
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Civic-Duty Participants

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I. INTRODUCTION

“In that America, your new president could be a man who stands by when a public figure tries to silence a private citizen with hateful slurs. Who won’t stand up to the slurs, or to any of the extreme, bigoted voices in his own party.”<sup>1</sup>

Sandra Fluke, a Georgetown law student, spoke these words during a speech at the 2012 Democratic National Convention (DNC) six months after a radio news talk show host publicly made defamatory statements about her. In her speech, she was making reference to Republican presidential candidate Mitt Romney, who did not denounce the radio talk show host, Rush Limbaugh, who branded her a “slut” and a “prostitute” on the public airwaves.<sup>2</sup> This incident occurred after she gave testimony at a House Democratic Steering and Policy Committee on the issue of women’s health and contraception. Instead of immediately filing a lawsuit for defamation, she used the DNC forum to publicly right the wrong committed by a media source as a result of her civic duty.

From a legal perspective, Fluke was broaching her status as a witness at a congressional meeting as that of a private individual or private figure—words commonly used in tort defamation law. This identification is important because, generally, a person considered to be in a private individual category, under defamation law, is afforded the opportunity to seek legal redress against the person or entity that publicly defames her.<sup>3</sup> Other category designations, outside of the private individual category, usually have different burdens to overcome before a remedy can be considered. Thus, clarifying one’s status in a defamation action is paramount. So in this political speech, it was imperative to all that Fluke safeguarded the notion that a private person engaging in a minor task who participates in civic activities, such

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1. National Journal Staff, *Sandra Fluke’s Speech: Full Text from the Democratic National Convention*, NAT’L J., Sept. 5, 2012, <http://www.nationaljournal.com/conventions-speeches/sandra-fluke-s-speech-full-text-from-the-democratic-national-convention-20120905>, archived at <http://perma.unl.edu/6G28-PNXW>.  
2. See sources cited *infra* note 4.  
3. See RESTATEMENT (SECOND) OF TORTS § 580B (1977).

as testifying at a congressional meeting, should not lose their private figure status.

The public defamatory comments about Fluke became a national controversy that made the constraints of defamation law prominent. Becoming the target of uncongenial and calumnious comments gained her support from the general public and other news media personnel who believed the vile attack crossed the line of media reporting. Headlines were rampant in many leading newspapers.<sup>4</sup> The controversy even garnered attention from the President of the United States, who defended her right to engage in issues she cared about and to speak her mind in a civil and thoughtful way without being attacked or called horrible names.<sup>5</sup> The President said that he wanted to send a message that being part of a democracy involves argument, disagreements, and debate, particularly when you are a private citizen.<sup>6</sup> His comments actually conceded the need for civic responsibility and the importance of media restraint under the guidelines of defamation law. In addition to the President's support, the true extent of the backlash against Limbaugh for his remarks arose

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4. See Mary Bruce & Jake Tapper, *Sandra Fluke: Rush Limbaugh 'Slut' Comment 'Outside the Bounds of Civil Discourse'*, ABC News (Mar. 2, 2012, 6:57 PM), <http://abcnews.go.com/blogs/politics/2012/03/sandra-fluke-rush-limbaugh-slut-comment-outside-the-bounds-of-civil-discourse>, archived at <http://perma.unl.edu/R7BT-AV9G>; Steve Frank, *Exclusive: Woman Silenced at Birth Control Hearing on 'Ed Show' Tonight*, MSNBC (Feb. 16, 2012, 4:08 PM), [http://ed.msnbc.com/\\_news/2012/02/16/10427828-exclusive-woman-silenced-at-birth-control-hearing-on-ed-show-tonight?lite](http://ed.msnbc.com/_news/2012/02/16/10427828-exclusive-woman-silenced-at-birth-control-hearing-on-ed-show-tonight?lite), archived at <http://perma.unl.edu/H3L-9X64>; Todd Leopold, *Limbaugh Revels in the Crossfire After Fluke Comments*, CNN (March 8, 2012, 11:22 GMT), <http://www.cnn.com/2012/03/05/us/rush-limbaugh-controversy/index.html?iref=allsearch>, archived at <http://perma.unl.edu/4L68-UUMD>; Jack Mirkinson, *Rush Limbaugh: Sandra Fluke, Woman Denied Right to Speak at Contraception Hearing, a 'Slut'*, HUFFINGTON POST (Feb. 29, 2012, 9:26 PM), [http://www.huffingtonpost.com/2012/02/29/rush-limbaugh-sandra-fluke-slut\\_n\\_1311640.html?ref=media](http://www.huffingtonpost.com/2012/02/29/rush-limbaugh-sandra-fluke-slut_n_1311640.html?ref=media), archived at <http://perma.unl.edu/59R6-TU8U>; Brian Stelter, *Obama Backs Student in Birth Control Furor*, N.Y. Times, March 3, 2012, <http://query.nytimes.com/gst/fullpage.html?res=9404E5D81639F930A35750C0A9649D8B63>, archived at <http://perma.unl.edu/LSG8-9BDH>.
  5. President Obama said Limbaugh's comments "don't have a place" in public discourse. *Obama: No Place for Limbaugh's Remarks*, WALL ST. J., Mar. 6, 2012, <http://live.wsj.com/video/obama-no-place-for-limbaugh-remarks/1A66A2B9-746C-4D2F-B794-96694E66560F.html#!1A66A2B9-746C-4D2F-B794-96694E66560F>, archived at <http://perma.unl.edu/RC6N-CWP5>; *Rush Limbaugh vs. Sandra Fluke: A Timeline*, THE WEEK, March 9, 2012, <http://theweek.com/article/index/225214/rush-limbaugh-vs-sandra-fluke-a-timeline>, archived at <http://perma.unl.edu/3RRH-4QN8>.
  6. *Obama: No Place for Limbaugh's Remarks*, WALL ST. J., Mar. 6, 2012, <http://live.wsj.com/video/obama-no-place-for-limbaugh-remarks/1A66A2B9-746C-4D2F-B794-96694E66560F.html#!1A66A2B9-746C-4D2F-B794-96694E66560F>, archived at <http://perma.unl.edu/RC6N-CWP5>.

from sponsors of his show, who cancelled their sponsorship as a means of disassociating themselves from his potentially libelous speech.<sup>7</sup>

The public comments by Limbaugh regarding Fluke were calumnious at best, hence the coined phrase: calumnious news reporting. Calumnious news reporting is more than “yellow journalism”;<sup>8</sup> it is akin to the usage of vulgar, uncongenial, or denigrating expressions, which are sometimes the norm in hostile working environments and instances of racial harassment. When calumnious language is used in news coverage, it generally contains the use of “indecent” words—words that are “beyond the pale” of what can be said in polite society.<sup>9</sup> Such comments are probably outside the protection of the First Amendment, in addition to being uncivil, insensitive,<sup>10</sup> hostile, or prejudicial (i.e., containing racial slurs and epithets).<sup>11</sup> Such language can be defamatory, as well as exceedingly crude. In addition, they may place a person in false light.<sup>12</sup> However, for the purposes of this article, calumnious news reporting will be used to describe a method of sensationalizing the news by adding defamatory commentaries, directly or indirectly, about a person who is incidental to a news story.

Unfortunately, calumnious news reporting is on the rise in this new era of continuous 24-hour news reporting on competing television stations. Calumnious or uncongenial news reporting by some news

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7. See Leopold, *supra* note 4 (indicating eight companies, including AOL, Quicken Loans, and ProFlowers, announced they were pulling ads from Limbaugh's show, the No. 1 radio show in America); see also *Rush Limbaugh's Sandra Fluke Controversy Still Hurting Business, Says CEO*, HUFFINGTON POST (March 21, 2013, 10:05 AM), [http://www.huffingtonpost.com/2013/03/21/rush-limbaugh-sandra-fluke-advertisers\\_n\\_2923643.html](http://www.huffingtonpost.com/2013/03/21/rush-limbaugh-sandra-fluke-advertisers_n_2923643.html), archived at <http://perma.unl.edu/N7YH-DGC8> (reporting Limbaugh's remarks spurred over 100 advertisers and two radio stations to drop his show).

8. Media historian Frank Luther Mott listed some defining characteristics of yellow journalism: prominent headlines that “screamed excitement, often about comparatively unimportant news”; a lavish use of pictures, many of them without significance; faked interviews and stories; a Sunday supplement and color comics; and a “more or less ostentatious sympathy with the ‘underdog,’ with campaigns against abuses suffered by the common people.” W. JOSEPH CAMPBELL, *YELLOW JOURNALISM: PUNCTURING THE MYTHS, DEFINING THE LEGACIES* 7 (2001).

9. Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 491 (1991) (describing vulgar expressions commonly used in hostile working environments).

10. See *id.*

11. *Id.*

12. One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

commentators and news talk show hosts is prevalent against public officials and public figures. But, today, it has even transgressed to private persons, hereinafter referred to as “civic-duty participants,” who incidentally participate in minor tasks in furtherance of civic responsibility. This reporting phenomenon is seen in hostile political news commentaries or in political attack ads that use sound bites, taken out of context, to mislead listeners into believing that the speaker took a contrary position on a given subject.<sup>13</sup> In other cases, verbal attacks have been launched against civic-duty participants by discrediting their occupation or personal life in an effort to place them in a false light.<sup>14</sup> And in other situations, attacks have been hurled at jurors who were summoned to serve on criminal trials.<sup>15</sup> Nevertheless, all of these victims in calumnious news reporting are civic-duty participants who are responsive to the call of civic duty. However, when methods of sensationalizing news stories defame members of society who undertake civic responsibilities that benefit our democratic process, news commentators believe their best defense falls within the constitutional privilege enunciated in *Gertz v. Robert Welch, Inc.*,<sup>16</sup> and its progeny.

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13. See Scott Finn, *Should TV Stations Refuse to Air Political Ads That Make False Claims?*, NPR (Oct. 3, 2012, 9:56 AM), <http://www.npr.org/blogs/itsallpolitics/2012/10/03/162184983/should-tv-stations-refuse-to-air-political-ads-that-make-false-claims>, archived at <http://perma.unl.edu/WH8N-QTX2> (reporting viewers are seeing more political ads than ever before, but television stations only rarely fact check any of the ads and even when television stations conduct fact checks, that story is overwhelmed by a flood of TV ads).
  14. See Larry Rohter, *Real Deal on ‘Joe the Plumber’ Reveals New Slant*, N.Y. TIMES, Oct. 17, 2008, at A21, archived at <http://perma.unl.edu/XW7V-S9MX> (reporting on Joe the Plumber, who set himself on a path to becoming America’s newest media celebrity and, as such, suddenly faced celebrity-level scrutiny); see also Zack Stafford, *Hey! Stop Talking, You Woman! The Attack on Katherine Fenton*, HUFFINGTON POST (Oct. 18, 2012, 7:00 PM), [http://www.huffingtonpost.com/zack-stafford/katherine-fenton\\_b\\_1979877.html](http://www.huffingtonpost.com/zack-stafford/katherine-fenton_b_1979877.html), archived at <http://perma.unl.edu/EJN6-FZQ3> (reporting a ‘study’ of Katherine Fenton’s alleged personal Twitter account, which, from the evidence, shows some tweets that have been presented out of context, presumably in hopes of damaging her credibility in the public eye).
  15. Headline News television host Nancy Grace used crude and uncongenial words when she called twelve civic duty participants, who were serving as jurors, “kooky” after they acquitted a deceased child’s mother of murder, manslaughter, and child abuse charges. See *Nancy Grace Discusses Casey Anthony Trial Verdict on Good Morning America (Video)*, HOLLYWOOD REPORTER, July 6, 2011, <http://www.hollywoodreporter.com/live-feed/nancy-grace-discusses-casey-anthony-208295>, archived at <http://perma.unl.edu/PSZ6-V4YN> (reporting George Stephanopoulos’s Good Morning America News interview with Nancy Grace after her comment about the jury); Kevin Spak, *Nancy Grace Defends Calling Casey Anthony Jury ‘Kooky,’* NEWSER.COM (Jul 6, 2011), <http://www.newser.com/story/122753/nancy-grace-defends-reaction-to-kooky-casey-anthony-jury.html>, archived at <http://perma.unl.edu/P7RF-DC3H>.
  16. 418 U.S. 323 (1974). The *Gertz* decision places great emphasis on the status of plaintiffs as public officials, public figures, involuntary public figures, or private

Because defending defamatory calumnious news reporting depends upon the ambiguities of *Gertz* and its progeny as relevant case law, the media is misinformed about status and privilege. *Gertz* and its progeny take some blame for the vagueness in defamation law by means of placing defamed plaintiffs in categories of public officials, public figures, involuntary public figures and private individuals. Additional blame can be placed on vague federally mandated obligations and vague judicial opinions.<sup>17</sup> These ambiguities give the media a perceived license to trample upon the dignity of persons who participate in our democratic governance and inform the media's perception of news stories that purport to address matters that allegedly are "newsworthy,"<sup>18</sup> a sort of code word for the public controversy element that arises in defamation defense. Hence, their authority, as the media would see it, is embedded somewhere in the constitutional privilege recognized by the United States Supreme Court and the precedent cases that blur components of defamation law.

This article, however, clarifies the status of civic-duty participants by balancing the plaintiff category or status with the roles of civic-duty participants and the precedent law, as defined by *Gertz* and its progeny. By analyzing the ambiguities of *Gertz* and its progeny with the activities of civic-duty participants, this article asserts that the media does not have First Amendment protection when it reports calumnious news stories that attack miniscule activities of civic-duty participants when the original intent of the news article is actually to censure another cause or public concern. This type of reporting results in the civic-duty participant suffering collateral damage without redress as the ambiguities of defamation law continue to mislead the media.

Since *Gertz* and its progeny constructed and altered the category or status of potentially defamed plaintiffs to define the media's First Amendment shield, a structural schematic will be used to help navigate the maze these precedents left behind. But first, Part II of this article will illustrate a contextual background of defamatory speech by the media regarding civic-duty participants whose activities were dissipating and insufficient to be dispositive to an analysis of whether

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individuals. *Id.* Clear distinction is made that private persons, unlike public officials and public figures, are not required to prove actual malice to win their libel lawsuits, but prove only some degree of fault. *Id.* at 346.

17. See Drew Simshaw, *Survival of the Standard: Today's Public Interest Requirement in Television Broadcasting and the Return to Regulation*, 64 FED. COMM. L.J. 401, 407 (2012) (indicating there was a belief that federally mandated obligations were too vague and that proper enforcement would require too great of a threat to the First Amendment rights of broadcasters).
18. See J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 5:77 (2d ed. 2014) (indicating that unless privileged as newsworthy, the public disclosure of embarrassing private facts is not protected by the First Amendment).

media qualifies for the protections afforded in defamation actions.<sup>19</sup> Part III begins the illustration of the structural schematic by offering an overview of the precedent that created the criterion of constitutional protection for defamatory speech. This Part examines the rubrics of categories into which defamed plaintiffs are classified, according to *Gertz*, and the modifications of the rubric, according to its progeny. In light of the evolution of defamation law, Part IV balances some previously reported activities of civic-duty participants with the trail of precedent law and the restrictions of duties associated with civic responsibility. This Part also explains why civic-duty participants are not public figures, but private figures. Finally, Part V argues that the progeny of *Gertz* and its trail of ambiguity disturbs neither status nor public-concern arguments when calumnious news reporting targets civic-duty participants while performing civic duties.

## II. CIVIC-DUTY PARTICIPANTS CAUGHT IN THE CROSSROADS

In the mist of defamation law, civic-duty participants are caught in the middle of the call for civic responsibility and constitutional ambiguities. On one side, the design of the democratic structure of civic responsibility is premised on national, state, or local service and civic responsibility as key organizational features. On the other side, the ambiguities of defamation law evolved from the process of carving out First Amendment protections for the media after the introduction of a status-driven test, a content-based test, or some combination of the two.<sup>20</sup> In the crossroads lie complications for individuals simply seeking to act according to civic responsibility who are sometimes blindsided as targets of calumnious news reporting when the original intent of the news article is actually to censure another cause or public concern. This predicament must be addressed because acting in the public realm is part of citizens' social contract (e.g., paying taxes, voting, serving in the military and on juries, and obeying the laws, etc.), yet most of life takes place (or ought to take place) in the separate,

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19. Examples of cases where there is dispositive analysis of whether defendants qualify for the protections of defamation law: a retired Army General who assumed a public leadership role in a racial conflict, *Walker v. Assoc. Press*, 388 U.S. 130 (1967); a real estate developer seeking zoning variances, *Greenbelt Coop. Publ'g Assoc v. Bresler*, 398 U.S. 6 (1970); a candidate in the Democratic Party's primary election for U.S. Senator, *Monitor Patriot v. Roy*, 401 U.S. 265 (1971); a minister at the Universal Life Church, *Hensley v. Time, Inc.*, 336 F. Supp. 50 (N.D. Cal. 1971).

20. Joseph H. King Jr., *Deus ex Machina and the Unfulfilled Promise of New York Times v. Sullivan: Applying the Times for All Seasons*, 95 Ky. L.J. 649, 657 (2007).



private realm of the individual.<sup>21</sup> Accordingly, when the status of a civic-duty participant is challenged to avoid liability, the law of defamation must clearly and appropriately draw the line between public and private status. Additionally, the law must be identified regarding public-interest determinations on when and how to limit media speech relating to individuals that may unduly impact the viability of a claim for defamation. Thus, without clear guidelines, the message sent to the citizenry is: stay in the private realm to avoid being a target of social injustice through calumnious news reporting.<sup>22</sup> This message has the effect of chilling the democratic process and the social contract. This is not a good thing; a clear remedy is required in defamation for those plaintiffs that are defamed while serving as civic-duty participants, whether by choice or by chance.

While fulfilling their civic responsibility, civic-duty participants are generally oblivious to being subject to possible defamatory attacks. After indoctrination as part of a citizenry that places a high value on civic responsibility,<sup>23</sup> civic-duty participants express a willingness to undertake civic duty without first contemplating incidental consequences. Similarly, they are also likely to subscribe to the foundational belief that humans have one thing in common, the acceptance and display of mutual respect by each person within society.<sup>24</sup> As a result of these ingrained beliefs, they likely cannot fathom defamation as the repayment for their service as members of a political community with a duty of civic responsibility as they attempt to contribute to their government by doing what democracy invites them to do.<sup>25</sup>

From the defamation law standpoint, calumnious statements about the activities of civic-duty participants are confused with the

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21. Amitai Etzioni, *Law in Civil Society, Good Society, and the Prescriptive State*, 75 CHI.-KENT L. REV. 355, 363 (2000).

22. Lloyd T. Wilson, Jr., *Following Transformation's Thread: Reflections on the Citizen-Lawyer as Transformative Agent*, 43 IND. L. REV. 1091, 1103 (2010) (citing MARK ROBERT RANK, *ONE NATION, UNDERPRIVILEGED: WHY AMERICAN POVERTY AFFECTS US ALL* 19–20 (2005)).

23. See Paul A. Alarcón, *Recognizing and Regulating Home Schooling in California: Balancing Parental and State Interests in Education*, 13 CHAP. L. REV. 391, 395 (2010) (“[T]he state interest in an educated citizenry is a compelling interest in ensuring that students become economically independent and civically responsible.”).

24. See Fr. Robert J. Araujo, S.J., *Humanitarian Jurisprudence: The Quest for Civility*, 40 ST. LOUIS U. L.J. 715, 717 (1996) (“Humanitarian jurisprudence considers the law as an institution which seeks understanding of the views and concerns of all people. This jurisprudence attempts to realize its goal by arguing that a just society is founded on the realization that people have much in common, especially their mutual claims to the same human rights.”).

25. See David Copp, *Corrective Justice as a Duty of the Political Community: David Lyons on the Moral Legacy of Slavery and Jim Crow*, 90 B.U. L. REV. 1731, 1754 (2010) (stating “members of a political community have a duty of civic responsibility to contribute to their government’s doing what justice requires”).

public concern defense, and those participants' fleeting involvement in the activity is confused with the status categories of *Gertz* and its progeny. This legal entrapment can occur even when civic-duty participants are not at the center of a public controversy but, rather, are merely incidental to the media stories. Evidence of civic-duty participants trapped in this junction has become visible and problematic on more than one occasion. In fact, four noteworthy examples of media speech relating to civic-duty participants, whose status may not fit squarely within the parameters of defamation law and whose involvement in a controversy does not fit squarely within public concern, have occurred in the last four years.

Brandishing a civic-duty participant a slut and a prostitute after participating in a congressional committee hearing is one example of the media failing to distinguish between defamation's canons of public concern and plaintiff status. Sandra Fluke, a civic-duty participant, paid a high price for accepting an invitation to deliver testimony before the Democratic Steering and Policy Committee. Members of the committee invited her to an unofficial hearing to present data on how excluding Catholic universities and other religious institutions from having to cover birth control under the new healthcare law would impact students.<sup>26</sup> Six days after her testimony, Rush Limbaugh, a national radio talk show personality who speaks on news and political topics,<sup>27</sup> used her comments to label her a slut. He said:

What does it say about the college co-ed Sandra Fluke, who goes before a congressional committee and essentially says that she must be paid to have sex, what does that make her? It makes her a slut, right? It makes her a prostitute. She wants to be paid to have sex. She's having so much sex she can't afford the contraception. She wants you and me and the taxpayers to pay her to have sex. What does that make us? We're the pimps.<sup>28</sup>

By claiming that Sandra Fluke was asking the government to subsidize her sex life, Rush Limbaugh refocused the public controversy from the notion that the President was launching a "war on religion" to students wanting the government to pay for sex. This was a distraction from the original intent of the public-concern controversy. He also made further defamatory remarks about Fluke, saying:

Can you imagine if you were her parents how proud . . . you would be? . . . Your daughter . . . testifies she's having so much sex she can't afford her own birth control pills and she wants President Obama to provide them, or the Pope.<sup>29</sup>

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26. Press Release, Rep. Nancy Pelosi, House Democratic Steering and Policy Comm. Hearing on Women's Health (Feb. 23, 2012), *archived at* <http://perma.unl.edu/R5WW-VQA5>.

27. RUSH LIMBAUGH, *THE WAY THINGS OUGHT TO BE* 30 (1992) (indicating he shares with the audience an item from the news on any one of a variety of cultural and political topics).

28. See Bruce & Tapper, *supra* note 4 (repeating words spoken by Rush Limbaugh).

29. Mirkinson, *supra* note 4 (internal quotation marks omitted).

When a news commentator calls civic-duty participant jurors “kooky” on a news show, it is yet another noteworthy example of media’s calumnious news reporting disparaging civic-duty participants. Although it may be debatable whether the term “kooky” is a defamatory utterance, there is some argument that it may diminish the respect, goodwill, confidence, or esteem of the targeted group. It is also a statement used by the media that fits squarely within the junction between public concern and status of the plaintiff. In this instance, these words were used after the verdict of the *State v. Anthony* trial. The trial drew attention from local spectators and national news. However, unlike other news coverage, Headline News host Nancy Grace hurled character assassinations at defendant Casey Anthony, who had been charged with murdering her two-year-old daughter, Caylee Anthony.<sup>30</sup> But, more importantly, after the verdict, Grace diminished the goodwill of the jury by her uncongenial news reporting, not because she was reacting to the outcome of the verdict but as a defense for her news-reporting tactics during the trial. When asked by a news broadcast host about her coverage of the trial, her comments included these statements:

George, I tell the truth. Am I taking the heat for it? Yeah. Is that gonna make me stop looking for missing children and trying to solve unsolved homicides? No. I’m not going to let some kooky jury stop justice. Not for me anyway.<sup>31</sup>

Because her comments on the jurors’ verdict were even more malicious than her remarks about the trial itself, her calumnious news reporting caused public attention.<sup>32</sup> She not only disparaged the accused and attacked the verdict, which was the main public-interest story, but she demonized the defense and delegitimized the jury.<sup>33</sup> Her comment, although it may not be provable as a false assertion, even sparked a new controversy among media outlets concerning not the trial or the outcome but, rather, the calumnious reporting tactics regarding the jury, which recast the jury as the focus of ridicule and animosity.<sup>34</sup>

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30. See *Nancy Grace Discusses Casey Anthony Trial Verdict*, *supra* note 15; Spak, *supra* note 15.

31. *Nancy Grace Discusses Casey Anthony Trial Verdict*, *supra* note 15 (reporting George Stephanopoulos’s *Good Morning America* news interview with Nancy Grace after her comment about the jury).

32. James Poniewozik, *Dead Tree Alert: Avenging Grace*, *TIME*, July 8, 2011, at 61, archived at <http://perma.unl.edu/9KY2-9HA3>.

33. *Id.*

34. See, e.g., *Casey Anthony Jurors Explain Not Guilty Verdict*, *INSIDE EDITION* (July 7, 2011), <http://www.insideedition.com/headlines/2711-casey-anthony-jurors-explain-not-guilty-verdict>, archived at <http://perma.unl.edu/NQR2-LTJZ?type=image> (recording a juror saying, “I think a lot of things she says just fuel the fire and they’re based on nothing. It’s not fit for television.”); John Hudson, *Nancy Grace Under Fire: ‘The Devil Is Dancing,’ WIRE* (July 6, 2011, 9:41 AM), <http://>

Calumnious news reporting also affects civic-duty participants by encouraging media to validate fabricated stories. This type of delegitimization of a civic-duty participant materialized in a blogosphere news story.<sup>35</sup> Yet, unlike most news stories that start with a real public controversy, through calumnious news-reporting tactics one reporter manufactured a news story about a person when the original intent of the news article was actually to censure another cause. In this instance, the primary public controversy occurred after the National Association for the Advancement of Colored People (NAACP) threatened to issue a condemnation of Tea Party activism by equating it with racism.<sup>36</sup> Andrew Breitbart, a political news blogger, an-

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[www.theatlanticwire.com/politics/2011/07/nancy-grace-under-fire-devil-dancing/39616/](http://www.theatlanticwire.com/politics/2011/07/nancy-grace-under-fire-devil-dancing/39616/), archived at <http://perma.unl.edu/UB24-ZMZD> (indicating despite her insistence that she merely laid out the details of the case and drew a conclusion that any sensible person would come to, a number of media critics are uncomfortable with what they see as her exploitation of the trial); Howard Kurtz, *The Media's Casey Anthony Shame*, DAILY BEAST (July 5, 2011), <http://www.thedailybeast.com/articles/2011/07/05/the-media-s-casey-anthony-shame.html>, archived at <http://perma.unl.edu/73CT-RHPV> (indicating the Nancy Graces of the world are more interested in vociferous opinions—in her case, siding with prosecutors in almost every case—than in dispassionately weighing the evidence); Llewellyn H. Rockwell, Jr., *Ha Ha Ha*, LEWROCKWELL.COM (July 5, 2011), <http://www.lewrockwell.com/blog/lewrw/archives/90829.html>, archived at <http://perma.unl.edu/UB24-ZMZD> (“The bloodthirsty Nancy Grace is denouncing the jury, not only for their courageous verdict, but for being unwilling to go on TV.”); Mary Elizabeth Williams, *Nancy Grace Knows More than a “Kooky Jury,”* THE SALON (July 6, 2011), [http://www.salon.com/2011/07/06/nancy\\_grace\\_caylee\\_anthony\\_verdict/](http://www.salon.com/2011/07/06/nancy_grace_caylee_anthony_verdict/), archived at <http://perma.unl.edu/7JRR-HJFV> (“Whatever you or I may think of the case, the fact remains that a ‘kooky jury’ found Anthony not guilty, which means that Anthony now has, among other things, the right to not be exoriated by a two-bit character assassin like Nancy Grace”); David Zurawik, *Nancy Grace Outdoes Herself with Talk of Devil Dancing*, BALTIMORE SUN, July 5, 2011, [http://articles.baltimoresun.com/2011-07-05/news/bal-nancy-grace-dancing-with-the-devil-casey-anthony-20110705\\_1\\_nancy-grace-casey-anthony-trial-devil](http://articles.baltimoresun.com/2011-07-05/news/bal-nancy-grace-dancing-with-the-devil-casey-anthony-20110705_1_nancy-grace-casey-anthony-trial-devil), archived at <http://perma.unl.edu/C38E-E7Z3> (“I look at Grace on this video, and I have no problem understanding why so many hate the media so much.”)

35. Sean P. Trende, *Defamation, Anti-SLAPP Legislation, and the Blogosphere: New Solutions for an Old Problem*, 44 DUQ. L. REV. 607, 608 (2006). (“[B]logs’ are typically run by small, unincorporated individuals, sometimes as a mere pastime. Collectively, these blogs are known as the ‘blogosphere,’ and much as a collection of water molecules can become a tsunami of unimaginable power, so too can the collective power of the blogosphere wield tremendous significance. Individual writers without large corporate backing have signed book deals and made the New York Times Best-Seller list, largely based on the readership ‘built from scratch’ through their online writings. Their power extends to politics as well—blogs can reasonably claim to have brought down a Senate Majority Leader, ended the career of a network news anchor, and defeated a sitting Senator and recent vice-presidential candidate in a primary campaign.”).
36. Ed Morrissey, *Breitbart Hits NAACP with Promised Video of Racism*, HOT AIR (July 19, 2010, 12:55 PM), <http://hotair.com/archives/2010/07/19/breitbart-hits-naacp-with-promised-video-of-racism/>, archived at <http://perma.unl.edu/5JXD-JFN3>.

nounced that he would publish at least one video of NAACP members cheering racism.<sup>37</sup> He delivered on his promise by using clips from a video of Shirley Sherrod, former U.S. Department of Agriculture Director of Rural Development in Georgia, allegedly making racist remarks as she gave a speech as a civic duty.<sup>38</sup> Before and during the video, these statements were made by Breitbart:

In this piece you will see video evidence of racism coming from a federal appointee and NAACP award recipient and in another clip from the same event a perfect rationalization for why the Tea Party needs to exist.

....

We are in possession of a video from in which Shirley Sherrod, USDA Georgia Director of Rural Development, speaks at the NAACP Freedom Fund dinner in Georgia. In her meandering speech to what appears to be an all-black audience, this federally appointed executive bureaucrat lays out in stark detail, that her federal duties are managed through the prism of race and class distinctions.

....

In the first video, Sherrod describes how she racially discriminates against a white farmer. She describes how she is torn over how much she will choose to help him. And, she admits that she doesn't do everything she can for him, because he is white. Eventually, her basic humanity informs that this white man is poor and needs help. But she decides that he should get help from "one of his own kind". She refers him to a white lawyer.<sup>39</sup>

Accusing Sherrod by means of an incomplete video to create a news story was not enough. Along with a nearly 1,000-word blog post, he accused Sherrod of carrying out her duties "through the prism of race and class distinctions."<sup>40</sup> He also wrote that she discriminated racially against a white farmer.<sup>41</sup> The video on Breitbart's website turned out to be incomplete, and when Sherrod's full speech was revealed, it became clear that her remarks were not racist but, instead, an attempt at telling a story of racial reconciliation.<sup>42</sup> But, prior to the reveal, Sherrod was ousted from her job—collateral damage done by Breitbart's attempt to use his own notoriety to sway the outcome of

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37. *Id.*

38. Mary Clare Jalonick, *Shirley Sherrod Defamation Case Faces Blogger Free-Speech Challenge*, WASH. POST, March 17, 2013, [http://articles.washingtonpost.com/2013-03-17/politics/37795462\\_1\\_andrew-breitbart-shirley-sherrod-defamation-case](http://articles.washingtonpost.com/2013-03-17/politics/37795462_1_andrew-breitbart-shirley-sherrod-defamation-case), archived at <http://perma.unl.edu/7CG8-TYNP>; *Video Shows USDA Official Saying She Didn't Give 'Full Force' of Help to White Farmer*, FOX NEWS (July 20, 2010), <http://www.foxnews.com/politics/2010/07/19/clip-shows-usda-official-admitting-withheld-help-white-farmer>, archived at <http://perma.unl.edu/TA3B-AH4G>.

39. Andrew Breitbart, *Video Proof: The NAACP Awards Racism—2010*, BREITBART.COM (July 19, 2010), <http://www.breitbart.com/Big-Government/2010/07/19/Video-Proof—The-NAACP-Awards-Racism—2010>, archived at <http://perma.unl.edu/Q8TC-NM6A>.

40. *Id.*

41. *Id.*

42. Jalonick, *supra* note 38.

the controversial clash between the NAACP and Tea Party members over allegations of racism.<sup>43</sup>

Calumnious news reporting by imparting facts out of context from Facebook and Twitter is another illustration that positions civic-servant participants in the crossroads between public concern and status categories. That is what a nonprofit, online newspaper did. The *Washington Free Beacon* online newspaper attempted to overshadow the presidential debate by seeking to harm the reputation and esteem of a private civic-duty participant for being chosen to ask a question at the presidential debate. The *Washington Free Beacon* named Katherine Fenton a “certifiable party girl,”<sup>44</sup> highlighted sexually suggestive messages she had initiated,<sup>45</sup> and conveyed the message that she dislikes authority.<sup>46</sup> The newspaper reported this after Ms. Fenton simply asked a question to presidential candidates.<sup>47</sup> The headline read: *Party Girl Debate Questioner Loves Joose, Hates Cops and Women Who Watch Sports*.<sup>48</sup>

By imparting facts out of context from Facebook and Twitter accounts in order to create a headline, the *Washington Free Beacon* online newspaper made the fleeting appearance of Katherine Fenton the focal point of a matter of public concern. As a private person, her misfortune was in attending the presidential debate, being called on to ask a noncontroversial question, and receiving an answer that

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43. See Brian Montopoli, *Vilsack: I Will Have to Live with Shirley Sherrod Mistake*, CBS NEWS (July 21, 2010, 5:58 PM), [http://www.cbsnews.com/8301-503544\\_162-20011263-503544.html](http://www.cbsnews.com/8301-503544_162-20011263-503544.html), archived at <http://perma.unl.edu/PR6Y-HJLN> (reporting the Agriculture Secretary Tom Vilsack forced Shirley Sherrod to resign as a result of an out-of-context video posted to a conservative website); see also Jalonick, *supra* note 38 (reporting that “[d]ays after the NAACP clashed with Tea Party members over allegations of racism, a video has surfaced showing an Agriculture Department official regaling an NAACP audience with a story about how she withheld help to a white farmer facing bankruptcy and the video has forced the official to resign”).

44. Stafford, *supra* note 14.

45. Chloe, *Well, You Did Dare to Speak in Public, So I Guess You Deserve This*, FEMINISTING (October 18, 2012), <http://feministing.com/2012/10/18/well-you-did-dare-to-speak-in-public-so-i-guess-you-deserve-this/>, archived at <http://perma.unl.edu/6KBV-6T2J>.

46. Stafford, *supra* note 14.

47. Washington Free Beacon Staff, *Party Girl Debate Questioner Loves Joose, Hates Cops and Women Who Watch Sports*, WASH. FREE BEACON (October 17, 2012, 2:18 PM), <http://freebeacon.com/party-girl-debate-questioner-loves-joose-hates-cops-and-women-who-watch-sports/>, archived at <http://perma.unl.edu/Y84N-4WWF> (reporting that the question she asked was, “In what new ways do you intend to rectify the inequalities in the workplace, specifically regarding females making only 72 percent of what their male counterparts earn?”).

48. Joose is a flavored malt beverage.

49. *Id.*

prompted a firestorm for conservatives.<sup>50</sup> But in reality, the main controversy erupted when the Republican nominee stumbled over his answer about how he would “rectify the inequalities in the workplace.”<sup>51</sup> He referenced becoming the governor of Massachusetts, saying, “I had the chance to pull together a Cabinet, and all the applicants seemed to be men . . . . [A] number of women’s groups . . . brought us whole binders full of women.”<sup>52</sup> Because his comments immediately went viral on the Internet,<sup>53</sup> birthing a parody Twitter account and a Facebook fan page,<sup>54</sup> the *Washington Free Beacon* attempted to recast the original public controversy through negative publicity about Katherine Fenton, the civic-duty participant who was chosen from the audience to ask a question.

In light of these events, current defamation law fails to adequately provide a clear path to a remedy, and thus, many media outlets are willing to misapply the status category of the defamed plaintiff, or they identify the activity as one of public concern. The solution in evaluating defamation redress for civic-duty participants is to harmonize the constraints of civic responsibility with the present deficiencies of defamation law. This suggests that there must first be an understanding that civic-duty participants are in a position to do limited activities that would contribute to enabling the government to fulfill its requirement.<sup>55</sup> Second, there must be an understanding that within the ambiguous meaning of plaintiff status classification, public controversies, and situations where the involuntariness of the plaintiff is at issue, the progeny of *Gertz* did not act to overrule *Gertz*. Therefore, each factor must be weighed according to the contributions of

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50. Randi Kaye, *Tonight on AC360: Voter’s Equal Pay Question Leads to Smear Campaign*, CNN (Oct. 23, 2012, 7:05 PM), <http://ac360.blogs.cnn.com/2012/10/23/tonight-on-ac360-voters-equal-pay-question-leads-to-smear-campaign/>, archived at <http://perma.unl.edu/RGT8-YU6L>.

51. Maria Cardona, *Romney’s Empty ‘Binders Full of Women,’* CNN (October 18, 2012, 5:24 PM), <http://www.cnn.com/2012/10/17/opinion/cardona-binders-women>, archived at <http://perma.unl.edu/83P6-MSPA>.

52. *Id.* (internal quotation marks omitted).

53. *Id.* (indicating that the comment spawned Twitter handles and almost 300,000 people had supported a Facebook page about what a politically tactless statement it was).

54. Marlow Stern, *Mitt Romney’s ‘Binders Full of Women’ Comment Sets Internet Ablaze*, DAILY BEAST (Oct. 17, 2012), <http://www.thedailybeast.com/articles/2012/10/17/mitt-romney-s-binders-full-of-women-comment-sets-internet-ablaze.html>, archived at <http://perma.unl.edu/9KCN-SS69>.

55. See Copp, *supra* note 25, at 1749 (“[I]f the government is required to do something as a matter of justice or as a matter of rectifying past injustices, then office holders, citizens, and other members of the general community are in a position to do things that would contribute to enabling the government to fulfill its requirement.”).

precedent.<sup>56</sup> In sum, the balance must include the civic-duty participant's duty to the democratic structure with deference to *Gertz* and its progeny.

### III. AN OVERVIEW OF THE PRECEDENT THAT CREATED THE CRITERION OF CONSTITUTIONAL PROTECTION FOR DEFAMATORY SPEECH

The quandary of why calumnious news reporting is tolerable by the media, regarding civic-duty participants, is because of the vagueness in the criteria related to the constitutional protection for otherwise defamatory speech. To further understand why calumnious news reporting is endured, it is first important to recognize the evolution of the constitutional aspect of today's defamation law. This includes the U.S. Supreme Court's struggle to determine the extent of First Amendment protection.<sup>57</sup> It also includes understanding the complexity of constitutionalizing the law of defamation in light of the First Amendment that has shifted the function and goals of common-law defamation, perplexed the media, and left some private individuals believing they are unprotected. Consequently, these complexities altered several legal analyses of defamation law with regard to whether the plaintiff was within the public official-public figure grouping or a private figure group and whether the content of speech is of public or private interest.<sup>58</sup> As a result of these alterations, the Supreme Court left uncertainties in defamation law. While maintaining these conflicting signals concerning the defamed plaintiff's role and content of the speech in question, the Supreme Court failed to provide clear guidance and has not abandoned the maze of confusion. Thus, the Supreme Court deposited murky standards that permit the media to embellish and sensationalize new stories to the point of defamation, thereby causing society to become immune to calumnious news reporting.

Owing to *Gertz* and its progeny's attempt to develop clear guidelines, there are still some traceable areas outside of the confusion that provide a narrow opening for plaintiffs like civic-duty participants to seek legal redress for defamation. They can only be seen by filtering through the ill-defined plaintiff categories, the nature of the speech, and vague guidance on public interests. In order to reach these clar-

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56. This must be done without consideration of the media's claim of privilege protecting public issues without regard to the status of the plaintiff.

57. See Arlen W. Langvardt, *Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order from Confusion in Defamation Law*, 49 U. PITT. L. REV. 91, 92 n.1 (1987) ("The Supreme Court first recognized that defamation law is subject to constitutional limits and requirements in the landmark case, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).").

58. *Id.* at 93.



ion areas, this section will trace the evolution of defamation law with expanding structural schematics to illustrate the progression of the law and reveal the crevice where plaintiffs like civic-duty participants may seek redress.

### A. The Rubric of Categories in Which Defamed Plaintiffs Are Classified

The crucial matter of determining the status or category of a defamed plaintiff in a controversy was the first daunting task of considering how to balance redress for vulnerable persons and respond to First Amendment rights for the press. Starting with *New York Times Co., v. Sullivan*,<sup>59</sup> the Court set the wheels in motion to constitutionalize what they thought would be the proper scope of the public-figure doctrine.<sup>60</sup> What the *Gertz* court did was advance the same goal by identifying two main categories to establish a schematic of defamation plaintiffs.<sup>61</sup> At one end of the spectrum are “private individuals” and at the other end are “public officials” and “public figures.” On the latter side of the spectrum, the Court divides public officials and public figures into three categories: (1) involuntary public figures;<sup>62</sup> (2) all-purpose public figures;<sup>63</sup> and (3) limited-purpose public figures.<sup>64</sup> In doing this, the *Gertz* Court found the diversity of plaintiff statuses less confounding than determining when a statement involves an issue of public importance, but it did not provide a definitive test for determining status.<sup>65</sup> In actual application, however, determining exactly what makes a plaintiff a public figure has not proven to be a simple task, nor did it free the courts from considering standards of proof. The Court ultimately left behind a confusing nexus between the all-purpose public figure and the limited purpose public figure. This im-

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59. 376 U.S. 254 (1964).

60. Without a precise diagram for guidance, courts and commentators have had considerable difficulty determining the proper scope of the public-figure doctrine. King, *supra* note 20, at 668 (citing *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1082 n.4 (3d Cir. 1985)); *see also* *Waldbaum v. Fairchild Publ'n, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir. 1980) (“Unfortunately, the Supreme Court has not yet fleshed out the skeletal descriptions of public figures and private persons enunciated in *Gertz*.”).

61. *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1551–52 (4th Cir. 1994).

62. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

63. The Court recognized all-purpose public figures from instances where an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. *Id.* at 351.

64. The limited-purpose public figure is an individual who voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. *Id.*

65. James Chadwick, *A Conflict in the Public Interest: Defamation and the Role of Content in the Wake of Dun & Bradstreet v. Greenmoss Builders*, 31 SANTA CLARA L. REV. 997, 1012 (1991).

passee resulted in modifying the rubric of classifications to focus on the subject matter of the defamatory statements and other offshoots regarding language. Yet, what was meant to offer clarity produced additional ambiguity.

### 1. *Public Officials*

The first case determining the matter of status or category of a defamed plaintiff, *New York Times*, ushered a new level of complexity to the constitutionality of defamation law.<sup>66</sup> Not only did the 1964 *New York Times* case develop a category of a defamed plaintiff, but it also reshaped the traditional requirements of defamation law into an enormously multifaceted and demanding set of constraints as it balanced First Amendment freedom of speech with individual protection. The opinion also granted deference to the media in libel cases by seeking to reconfigure fault within the confines of the First Amendment. But more importantly for this discussion, the contribution of *New York Times* to the determination of plaintiff status was the catalyst of revolutionizing defamed plaintiffs.

In the *New York Times* case, the respondent, an elected Commissioner of the City of Montgomery, Alabama, alleged that statements in the defendant's newspaper ad had libeled him.<sup>67</sup> Although the Commissioner was not mentioned by name, he alleged that one of the statements could be read as referring to him.<sup>68</sup> Before Justice Brennan focused heavily on the importance of permitting debate on public issues, he acknowledged the general proposition that freedom of expression upon public questions is secured by the First Amendment.<sup>69</sup> In paying deference to the importance of permitting debate on public issues, Justice Brennan stated that there can be no denial of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."<sup>70</sup> The Court then determined that constitutional guarantees prohibited a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proved that the statement was made with "actual malice."<sup>71</sup> The Court's definition of actual malice resulted in the element of falsity superseding fault.<sup>72</sup> Thus, for defamation law, *New*

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66. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

67. *Id.* at 256.

68. *Id.* at 256-59.

69. *Id.* at 270.

70. *Id.*

71. *Id.* at 279-80.

72. "Actual malice" is the possession of prior knowledge that the allegedly defamatory statement was false or the display of reckless disregard for the truth. *Id.*

*York Times* was the wild seed of the constitutional garden, from which ever-growing layers of doctrinal and decision-making complexities sprouted.<sup>73</sup>

## 2. *Public Figures*

The *New York Times* actual malice requirement, with its First Amendment protections and the narrowed fault standards, now extends from public officials to public figures. In the case of *Curtis Publishing Co. v Butts*,<sup>74</sup> the Court decided bifurcated cases on libel actions that were brought against publishers by nonpublic officials.<sup>75</sup> The *Curtis* Court considered status and held that the plaintiffs were “public figures” because of the public interest in the circulation of the materials, and the publisher’s interest in circulating them was not less than that involved in *New York Times*.<sup>76</sup> The Court further stated that both defamed plaintiffs in the cases “commanded a substantial amount of independent public interest at the time of the publications; both, in [the Court’s] opinion, would have been labeled ‘public figures’ under ordinary tort rules.”<sup>77</sup> Thus, the Court held that “a ‘public figure’ who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.”<sup>78</sup> In addition, the Court extended the *New York Times* actual malice standard to claims by public figures.

Because the actions and views of public figures with respect to public issues and events are often of as much concern to citizens as the attitudes and behaviors of “public officials,”<sup>79</sup> the court extended the constitutional privilege to include them. In declaring that the *New York Times* standard evenly applies to cases involving “public men”—whether “public officials” or “public figures”—the *Curtis* Court pointed out that its decision would afford the necessary insulation for the fundamental interests that the First Amendment was designed to protect.<sup>80</sup> Moreover, this case established that in cases tried after the decision in *New York Times*, the Supreme Court should require strict

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73. See King, *supra* note 20, at 652 (“*New York Times* planted the seeds of a constitutional garden from which ever-growing layers of doctrinal and decision-making complexity have sprouted.”).

74. 388 U.S. 130 (1967).

75. *Id.*

76. *Id.* at 154.

77. *Id.*

78. *Id.* at 155.

79. *Id.* at 162.

80. *Id.* at 165.

compliance with the standard it established regarding the precise formulation of actual malice preceding falsity.<sup>81</sup>

In determining whether the *New York Times* rule should apply only in actions brought by public officials or whether it has a longer reach,<sup>82</sup> the *Curtis* bifurcated opinion, however, was inconsistent. In the first case, *Curtis Publishing Co. v. Butts*, the publisher of a magazine article accused an athletic director at a state university, who was employed by a private corporation, of conspiring to fix a football game.<sup>83</sup> From these facts the court considered the issue of whether the defendant magazine publisher engaged in unreasonable conduct constituting an extreme departure from standards of investigation and reporting ordinarily adhered to by responsible publishers.<sup>84</sup> It was determined that the plaintiff had attained his status as a public figure by his position alone since he previously served as head football coach of a university and was a well-known, respected figure within the coaching ranks.<sup>85</sup>

Consistencies with the first issue and ruling were not maintained in the second half of the bifurcated case. In the second case, *Associated Press v. Walker*, the issue was whether the plaintiff was entitled to a public figure status when, at the time of the publication, he was a private person who had taken command of a violent crowd and had personally led a charge against federal marshals sent to enforce a court decree and to assist in preserving order.<sup>86</sup> This second case also described the plaintiff as encouraging rioters to use violence and giving students technical advice on combating the effects of tear gas.<sup>87</sup> The Court determined that this plaintiff had achieved public figure status "by his purposeful activity amounting to a thrusting of his personality into the vortex of an important public controversy."<sup>88</sup> In spite of the different activities of the plaintiffs, the first *Curtis* decision did not serve as a predictive analysis regarding the ruling in the second *Curtis* decision. The first ruling spoke of a departure from standards of investigation and reporting while the second was consistent with *New York Times*. The activities of the plaintiffs were too different to warrant compliance with a single standard. But more importantly, the *Curtis* decision noted the term "public figure" includes those who

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81. See *id.* at 165-67 (indicating the judge's instructions in the lower court were correct in providing the jury "actual malice" instructions in accordance with *New York Times*).

82. *Id.* at 134.

83. *Id.* at 136.

84. *Id.* at 136-38.

85. *Id.* at 135-36.

86. *Id.*

87. *Id.*

88. *Id.* at 146.

thrust themselves into important public controversies<sup>89</sup> as well as those who commanded a substantial amount of independent public interest at the time of the publications.<sup>90</sup> This overly broad definition invited subjective reasoning and, therefore, inconsistent analysis.

Unlike *New York Times*, *Curtis* reached inconsistent results by measuring the plaintiffs' activities rather than their status. *Curtis* reasoned that both plaintiffs in the bifurcated cases commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able "to expose through discussion the falsehood and fallacies" of the defamatory statements.<sup>91</sup> *Curtis* erred on the analysis because it did not sufficiently address the general issue for these cases. Instead of determining whether the *New York Times* rule should apply only to public officials or whether it had a longer reach, *Curtis* differentiated between two opposing forms of activities of private persons and tailored one specific standard for defining "public figure" status, which had no basis in analogizing the issue.<sup>92</sup> Thus, *Curtis* dismantled the guidelines in considering the impact of *New York Times* on libel actions instituted by persons who are not public officials and therefore caused anyone to potentially metamorphose into a public figure.

While reviewing the subject matter of the defamatory statement as a faint litmus test for determining public figure status, *Curtis* opened the door to far-reaching interpretations for a host of public figure determinations.<sup>93</sup> *Curtis* identified two major characteristics of public figures.<sup>94</sup> Public figures were specifically defined as persons who ordinarily can gain access to the media to rebut defamatory charges and who voluntarily expose themselves in a meaningful sense to an enhanced risk of defamation.<sup>95</sup> Subsequent to *Curtis*, it was decided that the consideration of a public figure is a question of law for the court.<sup>96</sup> The issue for the courts then becomes whether the plaintiff is

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89. *Id.*

90. *Id.* at 154.

91. *Id.* at 155.

92. See *id.* at 163 (Warren, J., dissenting) (indicating differentiation between "public figures" and "public officials" and adoption of separate standards of proof for each has no basis in law, logic, or First Amendment policy).

93. Olympia R. Duhart, *When Time Stands Still: An Argument for Restoring Public Figures to Private Status*, 27 NOVA L. REV. 365, 372 (2002).

94. See David W. Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199, 223 (1976) (explaining the *Gertz* decision probably borrowed the class of public figures established in the companion cases of *Curtis*, 388 U.S. at 135).

95. *Id.*

96. See, e.g., *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1081 n.4 (3d Cir. 1985) (stating that "[t]he classification of a plaintiff as a public or private figure is a question of law to be determined initially by the trial court and then carefully scrutinized by an appellate court").

a public figure with respect to the subject matter of the defamatory statement.<sup>97</sup> Thus, with this question imbedded, the Supreme Court held that the following are public figures: a prominent local real estate developer who sought a zoning variance that would affect his plans for high-density housing;<sup>98</sup> a former professional football player who gained prominence for being involved in a major, well-publicized trade;<sup>99</sup> a Playboy playmate who posed for a photograph seeking international circulation, and whose expectations were fulfilled;<sup>100</sup> and a candidate in the Democratic Party's primary elections for U.S. Senator.<sup>101</sup> Therefore, after *Curtis*, distinguishing the subject matter increasingly blurred the effects of plaintiff status designation.

Debates transpired on how to distinguish the subject matter for the various public figure classifications as well as inquiries into whether the fault standards applied as a matter of content or whether a public controversy was controlling. In *Rosenbloom v. Metromedia, Inc.*,<sup>102</sup> the answer focused on the content of the debate.<sup>103</sup> *Rosenbloom* held that the First Amendment applied to state libel actions when the utterance involved issues of public or general concern.<sup>104</sup> The case then went on to determine a fault standard. The Court required clear and convincing proof for defamatory falsehood when the statement related to the private individual's involvement in an event of public or general concern.<sup>105</sup> Thus, the private individual must prove that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false (i.e., actual malice).<sup>106</sup>

### 3. *Private Persons*

In reexamining the public figure classification inquiry, the Supreme Court in *Gertz*<sup>107</sup> repudiated its position in *Rosenbloom*,<sup>108</sup> and

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97. VINCENT R. JOHNSON, *ADVANCED TORTS LAW: A PROBLEM APPROACH* 218 (2010).

98. *Greenbelt Coop. Publ'g Assoc. v. Bresler*, 398 U.S. 6 (1970); *RESTATEMENT (SECOND) OF TORTS*, *supra* note 3.

99. *Chuy v. Phila. Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979).

100. *Vitale v. Nat'l Lampoon, Inc.*, 449 F. Supp. 442 (E.D. Pa. 1978).

101. *Monitor Patriot v. Roy*, 401 U.S. 265 (1971).

102. 403 U.S. 29 (1971).

103. *Id.* at 43.

104. *Id.* at 44 (holding that the classification of status was a matter of content).

105. *Id.* at 45.

106. *Id.*

107. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

108. Debates on the various public figure classifications of plaintiff status resulted in further inquiries beyond the matter of the status of the individual into whether the fault standards applied as a matter of content or whether a public controversy was controlling. *Rosenbloom*, 403 U.S. 29. In *Rosenbloom*, the Court stated that the First Amendment applied to state libel actions when the utterance involved issues of public or general concern. *Id.* Thus, it was held that a libel

diverted fault and classification down another course. In *Gertz*, the defamed plaintiff was a lawyer who represented the family of a murdered victim.<sup>109</sup> The defendant was a magazine that published defamatory statements about the plaintiff.<sup>110</sup> As a defense to the defamation claim, the magazine asserted that the plaintiff was a public official or a public figure and that the article in question concerned an issue of public interest and concern.<sup>111</sup> The court held that newspapers and broadcasters that publish defamatory falsehoods about an individual who is neither a public official nor a public figure may not claim constitutional privilege under *New York Times*.<sup>112</sup> The Court noted that an absolute protection for the media requires a total sacrifice of the competing values served by the law of defamation.<sup>113</sup> Yet, in recognizing that the rationale for diverting the public figure status rule would lead to an ad hoc resolution of the plaintiff's status classification, the *Gertz* court diverted classification on another course by establishing a broad rule to treat various cases alike, even when they are distinguishable.<sup>114</sup> In essence, *Gertz* expanded the schematic of defamation plaintiffs into two spectrums.<sup>115</sup> The typography separated private individuals from public officials and public figures and further created a separate spectrum for public officials and public figures to include three types of public persons: involuntary public figures, all-purpose public figures, and limited-purpose public figures. The schematic would look something like this:

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action by a private individual against a media entity for a defamatory falsehood relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not (i.e., actual malice). *Id.* Classification then became a matter of content.

109. *Gertz*, 418 U.S. at 325.

110. *Id.*

111. *Id.* at 325–27.

112. *Id.* at 339–48.

113. The Court held that when the media publishes defamatory falsehoods about an individual who is neither a public official nor a public figure it may not claim a constitutional privilege against liability for defamation. *Id.* at 332.

114. Treating private persons differently than public officials and public figures would lead to an ad hoc resolution of the status classification. The Court stated, “Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application. Such rules necessarily treat alike various cases involving differences as well as similarities.” *Id.* at 343–44.

115. *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1551–52 (4th Cir. 1994) (indicating the Court elaborated a typography of defamation plaintiffs).

Private individuals	Public Officials and Public Figures		
	Involuntary public figures	All-purpose public figures	Limited purpose public figures

Consequently, *Gertz*'s dichotomy of status offers disconcerting explanations. First, the Court determined that an involuntary public-figure status may be obtained through *no purposeful action of one's own* but that instances of truly involuntary public figures are exceedingly rare.<sup>116</sup> The Court's support for the claim that this occurrence is exceedingly rare was unsubstantiated.<sup>117</sup> The Court avoided applying the involuntary public-figure status and failed to mention such status again in the case. Second, *Gertz* labeled two types of public figures: the all-purpose public figure and the more common limited-purpose public figure. The all-purpose public figure was defined as one who assumes a role of prominence in societal affairs.<sup>118</sup> Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.<sup>119</sup> The limited-purpose public figure category, on the other hand, was defined as one who voluntarily injects oneself into a particular public controversy, thereby becoming a public figure for a limited range of issues.<sup>120</sup> Yet *Gertz* equated these two categories as public figures that stand in a similar position.<sup>121</sup> This suggests that an individual could be deemed a limited-purpose public figure if his actions related to attaining such status were voluntarily or, in some cases, if they were somewhat coerced. Whatever the disconcerting explanation, a structural schematic of involuntary public figures, and all-purpose and limited-purpose public figures would look something like this:

Private individuals	Public Officials and Public Figures		
	Involuntary public figures	All-purpose public figures	Limited purpose public figures
	exceedingly rare instance	pervasive fame or notoriety for all purposes and in all contexts	voluntarily injects oneself or coerced but > a minimal role

116. *Gertz*, 418 U.S. at 345.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 351.

121. *Id.* at 345.



The opinion then offered a confusing nexus between two status categories as it expanded on the disconcerting explanations. In the face of a totally unexpected event, the Court explained that, “In either case[,] such persons, involuntary public figures and limited-purpose public figures, assume special prominence in the resolution of public questions, thus, reemphasizing active participation.”<sup>122</sup> *Gertz*’s parallelism between the two categories and the subsequent applications throughout the case render the previous statement concerning involuntary public figures merely hypothetical.<sup>123</sup> Thus, the above schematic follows the application of *Gertz* but not the ambiguous language of *Gertz*.

## B. The Modification of the Rubric of Classifications

At first blush, the rubric classification appears to be user-friendly for most cases. Although in the past the Supreme Court was reluctant to label anyone a limited-purpose public figure because its scope was restricted,<sup>124</sup> the two remaining categories were less difficult to maneuver. For the most part, it was presumed uncomplicated to distinguish private individuals from all-purpose public figures. However, a new judicial trend altered this straightforward methodology. The progeny of *Gertz* replaced the easy grid with a public concern or subject-matter debate, which was designed to trigger an analysis on the determination of limited-purpose public-figure status. This trigger came with very little guidance regarding which matters are of public concern, thereby allowing further ambiguity in the constitutional analysis.

Causing controversy among the Supreme Court justices,<sup>125</sup> the *Gertz* rationale for distinguishing public figures from private figures created internal discontent and more confusion. Dissenting opinions criticized public-figure designations and supported private-individual designations. Justice Brennan stressed that the Court must strike

122. See Christopher Russell Smith, *Dragged into the Vortex: Reclaiming Private Plaintiffs’ Interests in Limited Purpose Public Figure Doctrine*, 89 IOWA L. REV. 1419, 1428 (2004) (noting the requirement of an active participation of the two categories with different definitions).

123. See *id.* (noting that in the following sentence after the involuntary public figure definition, and in the rest of the paragraphs, the Court focused on active involvement of the limited-purpose public figure).

124. See *Wolston v. Reader’s Digest Ass’n, Inc.*, 443 U.S. 157, 166 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 134–36 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 453–55 (1976). See generally RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 2.08, at 2–23 (1993) (“In the aftermath of *Gertz*, the Supreme Court undertook a series of refinements of the ‘limited’ public figure, consistently giving the term an application more restricted in scope than the simple word ‘public’ might suggest as a matter of popular colloquial usage.”).

125. The vote was 5 to 4 with Chief Justice Burger, Justice Douglas, Justice Brennan, and Justice White filing dissenting opinions. *Gertz*, 418 U.S. at 354, 404.

the proper balance between avoidance of media self-censorship and protection of individual reputations when applying the *New York Times* standard to libel actions concerning media reports of private individuals and events of public or general interest.<sup>126</sup> He believed that voluntarily or not, "we are all 'public' men to some degree."<sup>127</sup> Justice Burger indicated that he would prefer to "allow this area of defamation law to continue to evolve as it has up to now with respect to private citizens rather than embark on a new doctrinal theory which has no jurisprudential ancestry."<sup>128</sup> Justice White had the sternest dissent on this issue. He felt that the *Gertz* holding discarded history and precedent in a rush to refashion defamation law;<sup>129</sup> treated the First Amendment as if it were drafted to preclude a remedy to private citizens against a damaging falsehood;<sup>130</sup> rejected the judgment arrived at by the fifty states that the reputation interest of the private citizens deserves more protection;<sup>131</sup> and abolished presumed, general, and punitive damages rules as to libels or slanders defamatory on their face.<sup>132</sup> Justice White warned, "[S]cant, if any, evidence exists that the First Amendment was intended to abolish the common law of libel, at least to the extent of depriving ordinary citizens of meaningful redress against their defamers."<sup>133</sup>

In lieu of completely destroying the categories, the justices, in the progeny of *Gertz*, established a hybrid between category determination and the subject matter of the public controversy that, under certain circumstances, excludes private individuals from the analysis. This was completed in the span of three years, through the opinions of *Time, Inc. v. Firestone*,<sup>134</sup> *Hutchinson v. Proxmire*,<sup>135</sup> and *Wolston v. Reader's Digest Association*.<sup>136</sup> The hybrid formula, however, has side effects. The formula, combining the status categories and subject matter, both reinforced and narrowed the requirement for a defamed plaintiff to be a public figure in a libel suit. In fact, one of the cases

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126. *Id.* at 361 (Brennan, J., dissenting).

127. *Id.* at 364 (Brennan, J., dissenting).

128. *See Gertz*, 418 U.S. at 355 (Burger, C.J., dissenting) (indicating the important public policy which underlies this tradition—the right to counsel—would be gravely jeopardized if every lawyer who takes an "unpopular" case, civil or criminal, would automatically become fair game for irresponsible reporters and editors who might, for example, describe the lawyer as a "mob mouthpiece" for representing a client with a serious prior criminal record, or as an "ambulance chaser" for representing a claimant in a personal injury action).

129. *Id.* at 380 (White, J., dissenting).

130. *Id.* at 380–81 (White, J., dissenting).

131. *Id.* at 355 (Burger, C.J., dissenting).

132. *Id.* at 392–98 (White, J., dissenting).

133. *Id.* at 381 (White, J., dissenting).

134. 424 U.S. 448 (1976).

135. 443 U.S. 111 (1979).

136. 443 U.S. 157 (1979).

mandated that the defamed plaintiff’s designation as a limited-purpose public figure is determined if he or she has assumed the risk that comes with being a public figure and had access to “self-help” to help mitigate damage to his or her reputation.<sup>137</sup> The Supreme Court crossbred this concept by placing importance on the subject matter of the statements in question.<sup>138</sup> The condensed foci in the trilogy after *Gertz—Firestone, Hutchinson, and Wolston*—mean the determination of the limited-purpose public-figure plaintiff is now relevant only when the subject matter of the defamatory statement has been evaluated. Therefore, *Gertz* modifies the structural schematic to expand the limited-purpose public figure look something like:

Private individuals	Public Officials and Public Figures		
	Involuntary public figures	All-purpose public figures	Limited-purpose public figures
	exceedingly rare instance	pervasive fame or notoriety for all purposes and in all contexts	voluntarily injects oneself or coerced but > a minimal role + assumed the risk and had access to “self-help”  triggered when the subject matter = public concern

In the trilogy of cases, the new rule demanded that the subject matter of the public controversy trigger the analysis on the determination of whether a plaintiff is a limited-purpose public figure. In *Firestone*, the Court refused to grant all-purpose public-figure or limited-purpose public-figure status to the plaintiff because the matter was not within the meaning of “public controversy,” despite the newsworthiness of the reported matter.<sup>139</sup> The issue here was whether

137. See Jeff Kosseff, *Private or Public? Eliminating the Gertz Defamation Test*, 2011 U. ILL. J.L. TECH. & POL’Y 249, 255 (2011).

138. See Smith, *supra* note 122 at 1430 (indicating that *Firestone, Hutchinson, and Wolston* reinforced and narrowed the *Gertz* court’s limited-purpose public figure doctrine).

139. *Firestone*, 424 U.S. at 454–55 (1976) (indicating that dissolution of a marriage through judicial proceedings “is not the sort of ‘public controversy’ referred to in *Gertz* . . . . Her actions, both in instituting the litigation and in its conduct, were

Ms. Firestone was an all-purpose or a limited-purpose public figure since her divorce proceedings with a wealthy member of society were public records.<sup>140</sup> The Court acknowledged that although Ms. Firestone was the wife of a descendant who was an heir to a wealthy industrial family, she “did not assume any role of especial prominence in the affairs of society,”<sup>141</sup> and she did not “thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it.”<sup>142</sup> In *Hutchinson*, the Court refused to grant limited-purpose public-figure status to a research director and professor who received federal funds for projects once it was alleged that his research was a waste of general public expenditures.<sup>143</sup> The Court expressed that Professor Hutchinson did not thrust himself or his views into public controversy to influence others.<sup>144</sup> Here, the defendant publisher did not identify a particular controversy that was so compelling.<sup>145</sup> The Court concluded that, at most, the defamatory statements concerned general public expenditures that are shared by most and relate to most public expenditures; they were not sufficient to make Hutchinson a public figure.<sup>146</sup> In *Wolston*, the Court refused to grant limited-purpose public-figure status to a nephew of an admitted Russian spy who failed to respond to grand jury subpoena, thereby subjecting himself to a citation for contempt because, although they attracted media attention, the circumstances were not conclusive with regard to the public-figure issue.<sup>147</sup> The *Wolston* Court noted that the undisputed facts did not justify the conclusion that the defamed plaintiff “voluntarily thrust” or “injected” himself into the forefront of the public controversy surrounding the investigation of Soviet espionage in the United States.<sup>148</sup> In summation, the post-*Gertz* trilogy placed primary weight on the controversial content of the published information, followed by a secondary consid-

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quite different from those of General Walker in *Curtis Publishing Co.* . . . . She assumed no ‘special prominence in the resolution of public questions’” (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974))).

140. *Id.* at 452–55.

141. *Id.* at 454–55 (citing *Gertz*, 418 U.S. at 351).

142. *Id.* at 453 (indicating Respondent did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it).

143. *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979).

144. *Id.*

145. *Id.*

146. If it were, everyone who received or benefited from the myriad public grants for research could be classified as a public figure—a conclusion that our previous opinions have rejected. *Id.*

147. *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 166 (1979).

148. *Id.* at 167.

eration of the plaintiff's voluntary role in the event as the question of law.

Currently, the required subjective determination of public controversy creates an identity crisis for the application of the new legal rubric of defamation.<sup>149</sup> The confusion is causing some lower courts to construe the public-figure status narrowly with regard to the public importance of the published information,<sup>150</sup> while other courts interpret *Gertz* and its progeny more broadly. For instance, one criminal defendant was broadly identified as a limited-purpose public figure because it was determined that the public had a need for information and interpretation,<sup>151</sup> while, in another jurisdiction, a criminal defendant was not granted the same status because, from a narrow viewpoint, his alleged crimes were not matters of public controversy.<sup>152</sup> Likewise, in the cases of defamed musicians, one jurisdiction took the broad approach and held that musicians who entertained at a political fund-raising rally were public figures,<sup>153</sup> whereas, several years later, another jurisdiction held that a musician was not a limited-purpose public figure because there was no public controversy where a radio station aired a telephone call from a listener who asked whether the musician had murdered his girlfriend.<sup>154</sup> Additionally, conflicting interpretations transpired because the subjective conclusions of published information along with the plaintiff's status required determinations about the status of a plaintiff and, through some unidentifiable measurement, the significance of the published information.<sup>155</sup>

149. See Kosseff, *supra* note 137, at 257 (citing a significant problem with the new doctrine for defamation: as requiring both judicial inquiries beyond the competence of courts and subjective determinations based on the content of published information).

150. See *id.* (indicating post-*Gertz* state and federal courts have found many categories of plaintiff to be both public figures and private figures, despite similar facts).

151. Orr v. Argus-Press Co., 586 F.2d 1108, 1116 (6th Cir. 1978).

152. Thomas v. Tel. Publ'g Co., 929 A.2d 993, 1018 (N.H. 2007).

153. Rodriguez v. Nishiki, 653 P.2d 1145, 1149 (Haw. 1982).

154. Riddle v. Golden Isles Broad, LLC, 621 S.E.2d 822, 826 (Ga. Ct. App. 2005).

155. See Kosseff, *supra* note 137, at 257 nn.70–71, 73 & 76. Compare Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1083 (3d Cir. 1985) (finding that a lawyer representing a well-known motorcycle gang was a public figure because "it is clear that the present case involves a public controversy"), Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 274 (3d Cir. 1980) (holding that a company is a public figure because "through its advertising blitz, [it] invited public attention, comment, and criticism"), and Blum v. State, 255 A.D.2d 878, 880 (N.Y. App. Div. 1998) (finding a professor involved in a tenure dispute to be a public figure because he "thrust" himself into the public sphere), with Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc., 853 N.E.2d 770, 777 (Ill. App. Ct. 2006) (holding that the mere fact that [plaintiff] advertised its merchandise does not, without more, establish it as a limited purpose public figure), and Gilbert v. WNIR 100 FM, 756 N.E.2d 1263, 1272 (Ohio Ct. App. 2001) (finding that a prominent com-

However, since the trilogy of cases provides little guidance as to what matters are of public concern,<sup>156</sup> an analysis of limited-purpose public figures also lacks guidance. It is conceivable that the trilogy analysis only works well when the plaintiff activates it by voluntarily interjecting himself in a recognized public controversy,<sup>157</sup> thereby rendering himself as a limited-purpose public figure. But, courts are generally required to weigh the amount of voluntary participation,<sup>158</sup> which affects the outcome. In doing so, it may be that the importance of the controversy lowers the threshold for plaintiff's involvement to qualify as having "thrust" himself to the controversy's forefront.<sup>159</sup> This balance can, however, result in inconsistent outcomes. For instance, in the case of involuntary public figures, an individual may qualify for a limited-purpose public-figure status if the nature of the controversy is evaluated as a more central concern than the status of the plaintiff.<sup>160</sup> Or, if courts determine a controversy to be of sufficient public concern, a private plaintiff may be found to be a limited-purpose public figure, even though he or she has little or no involvement in the controversy.<sup>161</sup> Here, courts make this determination implicitly and without structured analysis, leaving the determination open to extrajudicial influences.<sup>162</sup>

In addressing this problem, the Supreme Court sought to define public controversy,<sup>163</sup> but the analysis formed the antithesis. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,<sup>164</sup> the Court only de-

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munity attorney was not a public figure in a libel suit over news reporting about a murder investigation).

156. Smith *supra* note 122, at 1421.

157. See King, *supra* note 20, at 669 (indicating, as is obvious from these two leading cases, that the common denominator in most cases addressing the limited-purpose voluntary public-figure subcategory has been the requirement of a public controversy and the plaintiff's voluntary participation in it).

158. See Smith, *supra* note 122, at 1440 (indicating how courts weigh the public-controversy requirement may determine the level of voluntary action they require for a plaintiff to be found a limited-purpose public figure).

159. Nat Stern, *Unresolved Antitheses of the Limited Public Figure Doctrine*, 33 HOU. L. REV. 1027, 1102 n.199 (1996) (citing Michael A. Bamberger, *Public Figures and the Law of Libel: A Concept in Search of a Definition*, 33 BUS. LAW. 709, 719 (1978) (interpreting prior cases to suggest guidelines for determining a limited public figure, including "the more significant the topic or controversy, the less weight is given to the reputational rights of the individual participant")).

160. Chadwick, *supra* note 65, at 1005 n.38; see also Smith, *supra* note 122, at 1421 (indicating if courts determine a controversy to be of sufficient public concern, a private plaintiff may be found to be a public figure even though he or she has little or no involvement in that controversy).

161. Smith, *supra* note 122, at 1421.

162. *Id.* at 1421.

163. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (indicating the only remaining issue is whether petitioner's credit report involved a matter of public concern).

164. *Id.*

finer what a public concern is not. In *Dun & Bradstreet*, a credit reporting agency sent an incorrect report to five subscribers indicating that a construction contractor had filed a voluntary petition for bankruptcy.<sup>165</sup> The construction contractor brought a defamation action alleging that the false report had injured its reputation.<sup>166</sup> The Supreme Court addressed whether the speech in question is a matter of public concern.<sup>167</sup> The Court held that speech on matters of purely private concern is of less First Amendment concern.<sup>168</sup> The Court stated, "There is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press."<sup>169</sup> Accordingly, when speech is wholly false and clearly damaging to the victim's business reputation, no special protection is warranted.<sup>170</sup> But more directly, the Court pointed out that petitioner's credit report concerned no public issue.<sup>171</sup> It was speech solely in the individual interest of the speaker and its specific business audience.<sup>172</sup> Thus, without giving guidance, the Court merely recited precedent to the generic definition of public concern: "[W]hether speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record."<sup>173</sup> So, while the opinion did not define public concern, *Dun & Bradstreet* did add to the private-individual-category structural schematic, altering its appearance as follows:

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165. *Id.* at 751.

166. *Id.* at 752.

167. *See id.* at 761 (citing *Connick v. Myers*, 461 U.S. 138, 147–48 (1983) (holding that whether speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record)).

168. *Id.* at 759.

169. *Id.* at 760 (citing *Harley Davidson Motorsports, Inc. v. Markley*, 568 P.2d 1359, 1363 (Or. 1977)).

170. *Id.*

171. *Id.* at 762.

172. *Id.*; *cf.* *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980).

173. *Dun & Bradstreet*, 472 U.S. at 761 (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

Private individuals	Public Officials and Public Figures		
triggered when speech is wholly false and clearly damaging to the victim's business reputation, or  triggered when speech solely in the individual interest of the speaker and its specific business audience	Involuntary public figures	All-purpose public figures	Limited-purpose public figures
	exceedingly rare instance	pervasive fame or notoriety for all purposes and in all contexts	voluntarily injects oneself or coerced but > a minimal role + assumed the risk and have access to "self-help"  triggered when the subject matter = public concern

The conundrum that ensued from the discontinuity left by *Dun & Bradstreet* is whether there is another burden of proof for private figures. Having failed to define public controversy, the pendulum swung to this newly established issue. To address the newly established issue concerning the burden of proof required by private figures, *Philadelphia Newspapers, Inc. v. Hepps*,<sup>174</sup> deemphasized the involuntary status of the private figure and attached the burden of proof to the undefined public-concern challenges. In this case, Hepps was the principal stockholder of a corporation that franchised a chain of stores. *The Inquirer* published a series of five articles whose general theme was that Hepps and its franchisees had links to organized crime and used some of those links to influence the State's governmental processes.<sup>175</sup> The suit was brought by Hepps and a number of the corporation's franchisees on the basis that the defamed plaintiffs were private figures.<sup>176</sup> The Court held that where a newspaper publishes speech of public concern about private figures, the private-figure plaintiffs cannot recover damages without also showing that the statements at issue are false.<sup>177</sup> Although the status of the plaintiffs and the content before the court were similar to *Gertz*,<sup>178</sup> the *Hepps* Court did not highlight the involuntary status of these private plaintiffs.

174. 475 U.S. 767 (1986).  
175. *Id.* at 769.  
176. *Id.* at 770.  
177. *Id.* at 778.  
178. *Id.* at 769.



Rather, what the *Hepps* Court offered was the indefinite public-concern rationale of *Dun & Bradstreet* by tying its proof-of-falsity holding to cases involving matters of public concern,<sup>179</sup> without consideration of status.

Recognizing that the current constitutional analysis of the defamation doctrine has led this area of law astray,<sup>180</sup> lower courts and the media now hold various interpretations on the impact of the changing law. Their various interpretations are being applied to the detriment of private individuals. For the courts, following the structural schematic is a start, but there is little to no direction on determining the full analysis of the meanings within the chart. While the Supreme Court justices are still quibbling about the *Hepps* ruling,<sup>181</sup> they have not yet definitively decided when the speech at issue is a matter of public concern.<sup>182</sup> But more important to the private individuals who are wrongly placed in the public-figure category is the matter of the state's interest in protecting their good name from the media. The Supreme Court has reached a pernicious end result by possibly demanding the lower courts create an ad hoc balancing technique similar to its unintentional model.<sup>183</sup> At the same time, the media is blurring the lines of the structural schematic by treating private individuals as public figures for sensational news reporting.

#### IV. THE APPROPRIATE EVALUATION OF DEFAMATORY REDRESS FOR CIVIC-DUTY PARTICIPANTS

A dispositive analysis for defamation allegations against private civic-duty participants must be syntactically approached with what has been left behind by *Gertz* and its progeny when news stories at-

179. See Langvardt, *supra* note 57, at 104 (indicating *Hepps* perpetuated and, in dictum, arguably extended the public concern rationale of *Dun & Bradstreet* by tying its proof-of-falsity holding to cases involving matters of public concern).

180. See Chadwick, *supra* note 65, at 1061–62 (1991) (indicating the particular test adopted by the Court is less important than the recognition that the status-based analysis in current constitutional defamation doctrine has led this area of law far astray).

181. *Hepps*, 475 U.S. at 780–90 (Stevens, J., dissenting).

182. Langvardt, *supra* note 57, at 930 (explaining that this issue exists because of the Court's abrupt conclusion that the statement in *Dun & Bradstreet*, a false credit report that the plaintiff had filed for bankruptcy, did not pertain to a matter of public concern; *Dun & Bradstreet* provided minimal guidance for making public concern/private concern determinations in future cases, while *Hepps* offered even less in that respect).

183. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 81 (1971) (Marshall, J., dissenting) (noting that the Court is required to weigh the nuances of each particular circumstance on its scale of values regarding the relative importance of society's interest in protecting individuals from defamation against the importance of a free press); see also *Hepps*, 475 U.S. at 789 (1986) (Stevens, Burger, White, and Rehnquist, J dissenting) (criticizing the majority for giving too little weight to the state's interest in compensating private-figure plaintiffs for injuries to their reputations).

tack such participants, though the original intent of the news article is to censure another cause or public concern. Because civic-duty participants are limited in their civic-duty activities by the constraints of the entity they are involved with, and because they are not public figures, their legal remedies are guaranteed. As implied by *Dun & Bradstreet*,<sup>184</sup> the evolution of defamation law appears to alter the category specifications for these civic-duty participants. However, despite the fact that the progeny of *Gertz* is comprised of confusing determinations as to how much weight is to be placed on the public controversy and confusion as to what public concern actually is, the dissipating roles of private civic-duty participants escape the traditional outcome. This is so notwithstanding the reality that *Gertz*, the trilogy of *Firestone*, *Hutchinson*, and *Wolston*, and even *Dun & Bradstreet's* holdings purposely limit the private-individual category from the public-concern argument. Thus, in applying the schematic above with the proper evaluation of the roles of civic-duty participants, an unadulterated result occurs.

#### A. Civic-Duty Participants Are Limited by the Constraints of the Entity with Which They Are Involved

Unlike public figures, civic-duty participants cannot defensibly be said to have voluntarily subjected themselves, by bare membership in the body politic, to the potential for stringent scrutiny and utterly damaging exposition of their private lives whenever their limited activities are deemed newsworthy by the press.<sup>185</sup> This is so even after a majority of the Supreme Court justices agreed to extend the constitutional privilege to defamatory criticism of public figures to include nonpublic figures.<sup>186</sup> That extension still does not incorporate private civic-duty participants who are responsive to civic duties and engage in dissipating activities because they are neither the central figures in a significant public controversy, nor do they seek to publicize their views on relevant controversies. At most, they are private figures among those individuals who, by happenstance, have been mentioned peripherally in a matter of public interest or have merely been named in a press account.<sup>187</sup>

Below are instances where the civic-duty roles of some private civic-duty participants are limited by the constraints of the entity they

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184. *Dun & Bradstreet* implicitly adds to the private-individual status category of the schematic.

185. David Elder, *Defamation, Public Officialdom and the Rosenblatt v. Baer Criteria—A Proposal for Revivification: Two Decades After New York Times Co. v. Sullivan*, 33 BUFF. L. REV. 579, 660 (1984) (referring to prototypical private persons).

186. See *Gertz v. Welch*, 418 U.S. 323, 335 (1974).

187. See *Wells v. Liddy*, 186 F.3d 505, 540 (4th Cir. 1999) (discussing the “exceedingly rare” individual who can be labeled in involuntary public figure).

are involved with, thereby precluding a dominant position in any newsworthy event. Some civic-duty role constraints are unique rules within the entity, while other constraints are limited by formal or informal judicial order. Nevertheless, civic-duty constraints preclude private civic-duty participants from activities that are more than fleeting.

### 1. *Routine Congressional Committee Meetings/Hearings*

While testimony of private civic-duty participants help congressional committee members collect information in the early stages of legislative policymaking, this type of limited input generally does not allow them to become intimately involved in the resolution of important public questions.<sup>188</sup> In the Sandra Fluke situation, after the Obama Administration announced it would require Catholic universities and charities to include birth control in their health coverage, the Oversight and Government Reform Committee scheduled a routine congressional committee meeting to review the impact of this announcement.<sup>189</sup> The meeting included a hearing. Invitations were sent to civic-duty participants from different faiths, and an invitation to Fluke.<sup>190</sup> Fluke was invited by virtue of the authority conferred on the House Democratic Steering and Policy Committee members and the minority members of the Oversight and Government Reform Committee.<sup>191</sup> The Oversight and Government Reform Committee however, rescinded the original invitation to Fluke because the Chairman believed her testimony fell outside the bounds of the agenda.<sup>192</sup> The agenda, according to the Chairman, was to hear testimony on whether the new healthcare law would encroach on the conscientious objections of religious groups,<sup>193</sup> not on the reproductive rights of women.

188. See *Curtis Publ'g Co. v. Butts*, 388 U.S. 133, 164 (1967) (defining public figures).

189. Alex Altman, *Sandra Fluke on Her Role in the Contraception Controversy: 'I Would Do This Again'*, TIME, March 8, 2012, <http://swampland.time.com/2012/03/08/sandra-fluke-on-her-role-in-the-contraception-controversy-i-would-do-this-again/>, archived at <http://perma.unl.edu/QZE9-PX2Q>.

190. Frank, *supra* note 4.

191. See JOHN H. SULLIVAN, CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE U.S. ONE HUNDRED TWELFTH CONGRESS, H.R. DOC. NO. 111-157, at 563 (2011), archived at <http://perma.unl.edu/LE2Q-5BHB> (noting that whenever a hearing is conducted by a committee on a measure or matter, the minority members of the committee shall be entitled, upon request to the chair by a majority of them before the completion of the hearing, to call witnesses selected by the minority to testify with respect to that measure or matter).

192. Altman, *supra* note 189.

193. *Lines Crossed: Separation of Church and State. Has the Obama Administration Trampled on Freedom of Religion and Freedom of Conscience?: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 112th Cong. 3-4 (2012), archived at <http://perma.unl.edu/FA4B-S2GE> (arguing over the fact that the meeting was not about reproductive rights of women).

After ejecting Fluke from the hearing, members of the minority party took their witness and left the meeting.<sup>194</sup> However, approximately eight days later, the members of the minority party provided a platform by way of an unofficial hearing, to acquire her input.<sup>195</sup>

Under the congressional rules for witnesses, civic-duty participants like Fluke are unable to voluntarily inject themselves or draw attention toward a particular public controversy. This process does not, however, preclude a person of notoriety from becoming a witness for congressional fact-finding, but the procedures are tailored such that the participant can only provide limited testimony for policymakers' consideration.<sup>196</sup> In this environment, the Chairman controls, and the participants seldom are central figures in a significant public controversy, nor do they have full control to publicize their views on the relevant controversy. As a matter of fact, the format and rules for the House of Representatives, as well as the Senate, preclude such interjection and influence.<sup>197</sup> More specifically, the controlling committee only allows minority party members to call witnesses of their choice on at least one day of a hearing<sup>198</sup> to mitigate both influence and controversy. A civic-duty participant called by the minority party is then "filtered" to prevent overwhelming interjection.<sup>199</sup> So, prior to hearings, a witness must be deemed "appropriate and qualified," and then vetted before being accepted by the committee chair as a wit-

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194. Laura Bassett & Amanda Terkel, *House Democrats Walk out of One-Sided Hearing on Contraception, Calling It an 'Autocratic Regime,'* HUFFINGTON POST (Feb. 16, 2012, 11:20 AM), [http://www.huffingtonpost.com/2012/02/16/contraception-hearing-house-democrats-walk-out\\_n\\_1281730.html](http://www.huffingtonpost.com/2012/02/16/contraception-hearing-house-democrats-walk-out_n_1281730.html), archived at <http://perma.unl.edu/HS5J-6SA9>.

195. Pelosi, *supra* note 26 (noting that, after Fluke's testimony, it was said by one Democrat that Fluke would stand firm in the cause of women's health, and no longer be held silent).

196. SULLIVAN, *supra* note 191, at 557–58 (indicating that witnesses who appear before it are required to submit in advance written statements of proposed testimony and to limit their initial presentations to the committee to brief summaries thereof).

197. *See id.*

198. *Id.* at 563 (explaining that whenever a hearing is conducted by a committee on a measure or matter, the minority members of the committee shall be entitled, upon request to the chair by a majority of them before the completion of the hearing, to call witnesses selected by the minority to testify with respect to that measure or matter during at least one day of hearing thereon); *see also* VALERIE HEITSHUSEN, SENATE COMMITTEE HEARINGS: PREPARATION 2 (2012), archived at <http://perma.unl.edu/Y4U5-F32H> (noting how Senate rules allow the minority party members of a committee to call witnesses of their choice on at least one day of a hearing, when the chairman receives a written request from a majority of the minority party members).

199. SULLIVAN, *supra* note 191, at 557–58 (indicating that witnesses who appear before it are required to submit in advance written statements of proposed testimony).

ness.<sup>200</sup> Additionally, in some cases, it is a tradition, rather than a rule, that the minority has only one witness that is appropriate and qualified to speak on the subject matter.<sup>201</sup> Therefore, whether the committee title is “legislative,” “oversight,” “investigative,” “confirmation,” or a combination of these, all routine hearings share common elements of preparation and conduct to guard against any civic-duty participant usurping a central role in the proceedings or creating a public controversy.<sup>202</sup>

## 2. *The Jury System*

In the matter of jurors, they are individually and collectively constrained in their involvement by the rules for jurors enunciated by the judicial system. Prior to sitting on a jury, prospective jurors are questioned extensively through written questionnaires by the court and sometimes by attorneys to determine whether they meet statutory requirements for service and whether they harbor biases that might prevent them from impartially deciding a case.<sup>203</sup> Once part of the jury pool, they are treated as though their rights to privacy evaporate, and the refusal to answer questions on grounds of privacy may cause them to be held in contempt of court and jailed.<sup>204</sup> They are, therefore, restrained in their roles by stringent rules.

Even the random selection of jurors in generating a jury pool is the beginning of limiting the involvement of a civic-duty participant. In federal courts, prospective juror lists were derived from voter registration enrollment.<sup>205</sup> Voter registration lists were chosen by Congress in part because they provided each qualified citizen an equal opportunity to cause his name to be among those from which random selection is made, and also because it was the largest generally available source

200. LINES CROSSED, *supra* note 193, at 35 (indicating to be deemed “appropriate and qualified,” a short proposed testimony by the civic-duty participant must be submitted to twenty-eight members of the majority party members).

201. *Id.* (indicating that the Oversight and Government Reform Committee noted it was a tradition and not a rule that the minority have one witness that is appropriate and qualified to speak on the subject matter).

202. See Heitshusen, *supra* note 198, at 1 (indicating the legislative, oversight, investigative, confirmation, or a combination of hearings that share common elements of preparation and conduct).

203. Lauren A. Rousseau, *Privacy and Jury Selection: Does the Constitution Protect Prospective Jurors from Personally Intrusive Voir Dire Questions?*, 3 RUTGERS J. L. & URB. POL’Y 287 (2006).

204. See Melanie D. Wilson, *Juror Privacy in the Sixth Amendment Balance*, 2012 UTAH L. REV. 2023, 2035–36 (2012) (indicating because voir dire covers so many topics, even jurors with no special sensitivity and nothing in particular to hide sometimes worry about exposing their private information).

205. *United States v. Cecil*, 836 F.2d 1431, 1445 (4th Cir. 1988).

that was frequently updated.<sup>206</sup> Now, with the use of technology, more inclusive and representative master jury lists are made possible wherein state and federal courts merge two or more source lists and identify and remove duplicate records.<sup>207</sup> These lists, possibly derived from driver's licenses, property tax rolls, etc.,<sup>208</sup> are all generated from personal private data. Today, the vast majority of state courts and a sizeable number of federal courts have adopted the use of multiple lists as the starting point for creating a master jury list.<sup>209</sup> Private individuals, without the opportunity to solicit for inclusion, are among those to be chosen for a jury. For that reason, the ability to interject into a public controversy is prohibited.

Protecting jurors from intrusions resulting from calumnious news reporting is not an argument to assert the existence of an actual right of privacy on the part of jurors,<sup>210</sup> but, rather, an argument that seeks to honor the civic responsibility that jurors must engage in on behalf of society. It is an endowment that protects the integrity of private individuals who have not recoiled before their responsibility, but have answered a jury summons.<sup>211</sup> From a legal perspective, the authen-

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206. *United States v. Hanson*, 472 F. Supp. 1049, 1054 (D. Minn. 1979), *aff'd*, 618 F.2d 1261 (8th Cir. 1980).

207. Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 779 (2011).

208. *Id.* (stating how forty-three states and the District of Columbia permit the use of two or more source lists to compile master jury lists, of which thirty-one mandate the use of at least two lists and eleven mandate the use of three or more lists—typically, registered voter, licensed driver, and state income or property tax lists).

209. *See id.*

210. *Press-Enter. Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 514 (1984) (Blackmun, J., concurring) (declining to decide the issue, explaining how “[w]e need not decide, however, whether a juror, called upon to answer questions posed to him in court during voir dire, has a legitimate expectation, rising to the status of a privacy right, that he will not have to answer” personal questions); *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (finding a constitutional right to withhold matters which are subject to a reasonable expectation of privacy); *U.S. v. Wecht*, 537 F.3d 222, 240 (3d Cir. 2008) (noting that “[w]e cannot accept the mere generalized privacy concerns of jurors’ as a sufficient reason to conceal their identities in every high-profile case” (quoting *In re Globe Newspaper Co.*, 920 F.2d 88, 98 (1st Cir. 1990))); RESTATEMENT (SECOND) OF TORTS § 652C cmt. d (1977) (“No one has the right to object merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation. It is only when the publicity is given for the purpose of appropriating to the defendant’s benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded.”).

211. Andrew E. Taslitz, *Why Did Tinkerbell Get off So Easy?: The Roles of Imagination and Social Norms in Excusing Human Weakness*, 42 TEX. TECH L. REV. 419, 474–75 (2009) (citing ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 295 (Henry Reeves Trans. 1945)) (explaining that the jury teaches every man not to recoil before the responsibility of his own actions and impresses him with that manly confidence without which no political virtue can exist).

ticity of the protection from calumnious news reporting is endowed in the holdings of *Gertz* and its progeny requiring the plaintiff's central role as essential to recognition of status.<sup>212</sup>

### 3. *Inconsequential Political Engagement*

When private civic-duty participants are chosen from an audience to ask political candidates a question at a public debate, they cannot control the debate rules to establish pervasive fame or notoriety for all purposes and in all contexts. Such private persons are generally not allowed to project their own image or views.<sup>213</sup> This is certainly true for Katherine Fenton. In her situation, she was merely one of many spectators in the audience who was selected to read their question to the political candidates. There was no known assumption of the risk of calumnious news reporting or consequences associated with this participation. While her question triggered a candidate's gaffe, her civic participation, in and of itself, was not from the podium of projecting her own image or views to the public.

Civic-duty participants who are involved in dissipation or incidental political engagement are not allowed a dominant role when the civic-duty course of action is preset. Fenton's case is a principal example in which the defamed individual's involvement in incidental political engagement lacks a dominant role. First, the format of the activity is paramount. Here, the Gallup organization chose eighty-two undecided voters from the New York area,<sup>214</sup> thereby reaching into a pool that is specified yet large. This format precluded some civic-duty participants from participating because the selected individuals were not published until the beginning of the process. Second, the goal of the moderator is predetermined. In the debate Fenton participated in, the goal of the moderator was to give the conversation direction and ensure questions get answered.<sup>215</sup> That goal was achieved by monitoring the political candidates and the civic-duty participants. Third and fourth, the order of when the participants would be chosen to ask a question and the manner in which the participant must conduct themselves before, during, and after the question was preset. In this case,

212. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974) (indicating the lawyer was not a public figure because he played a minimal role at the coroner's inquest); see also King, *supra* note 20, at 667 (indicating that the existence of a public controversy—and the plaintiff's central role with it—is essential even in the recognition of voluntary public figures).

213. See *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1300 (D.C. Cir. 1980) (defining public figure).

214. See *October 3, 2012 Debate Transcript*, COMM'N ON PRESIDENTIAL DEBATES (Oct. 3, 2012), <http://www.debates.org/index.php?page=october-3-2012-debate-transcript>, archived at <http://perma.unl.edu/D2JR-69AD> (indicating the procedure for choosing civic-duty participants for the 2nd presidential debate).

215. *Id.*

Fenton was the fourth of eleven persons to ask a question; her responsibility was simply to ask a question and take her seat, which she did. In fact, after each candidate answered the question posed, the moderator moved on to the next civic-duty participant to ask another question.<sup>216</sup> As a result, the actions of civic-duty participants and the degree of public attention that developed from participating in fleeting activities in this political event precluded them from exercising dominance and activating a limited-purpose public-figure status.

When a private person accepts a government job, and an invitation to speak as a civic-duty participant is based on the title or duties of that job, there generally is no substantial public controversy to voluntarily interject oneself into. As the U.S. Department of Agriculture Director of Rural Development for Georgia at the time of the defamatory statement, Shirley Sherrod was asked to address attendees at a National Association for the Advancement of Colored People (NAACP) Freedom Fund dinner. Some may consider involvement with this organization synonymous to political engagement. In accepting this invitation as a civic duty, her speech was a personal life story to urge poor people, white and black, to pull together and overcome racial divisions.<sup>217</sup> The content and the context in which she was speaking was not derived from any real or implied pervasive fame on the topic of race relations. The NAACP narrowed her audience to attendees only. Also, there was no assumption that her participation in community and professional affairs gave her special prominence or the ability to gain access to the media.<sup>218</sup>

In concluding that the above-mentioned private civic-duty participants are limited by the constraints of the entity they are involved with, it is important to consider the nature and extent of their participation. As a general rule, society does not scrutinize the activities of civic-duty participants who engage in routine governmental committee meetings, jury service, and inconsequential political engagements. These activities have not been labeled activities of public concern or public controversies. Jurors are drawn into a public forum largely by lot due to a jury summons system,<sup>219</sup> yet their role in the trial is tran-

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216. *See id.*

217. Shirley Sherrod, *Open Letter from Shirley Sherrod: You and I Can't Yield—Not Now, Not Ever*, NAACP (Aug. 17, 2010), <http://www.naacp.org/news/entry/you-and-i-cant-yeild-not-now-not-ever>, archived at <http://perma.unl.edu/E7AC-J5HN>.

218. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974) (indicating the Court would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes).

219. *See Time, Inc. v. Firestone*, 424 U.S. 448, 457 (1976) (indicating while participants in some litigation may be legitimate "public figures," either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others).



sitory. A civic-duty participant's role in an inconsequential political engagement or routine congressional meetings/hearings is only dissipating or fleeting relative to the substantial ramifications of government activities. A speech by a government employee made outside of the role of government employment is also trivial. Therefore, the activities from these civic duties are limited by the agency, court system, or organization and do not allow civic-duty participants to shape events in areas of concern to society at large.

## B. Civic-Duty Participants Are Not Public Figures

The general responsibilities of private civic-duty participants do not fit within the definitions of all-purpose and limited-purpose public figures for purposes of defamation law. *Gertz* identified categories that fall short of logic and are inapplicable to civic-duty participants. *Gertz* described the limited-purpose public figure in two ways. The opinion defined a limited-purpose public figure as "an individual [who] voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."<sup>220</sup> But, *Gertz* goes on to say, "[I]n either case such persons assume special prominence in the resolution of public questions."<sup>221</sup> The first definition for limited-purpose public figure is separated by the disjunctive conjunction of "or." Conversely, the add-on sentence results in a linguistic conundrum. Specifically, "or" in this context may be inclusive or exclusive; the descriptions set forth two quite distinct meanings. However, the progeny of *Gertz* sheds light on where the emphasis should lie. The trilogy opinions accentuate "thrust" more than coercion,<sup>222</sup> thereby placing more weight on the thrusting element in the definition and excluding the assumption of special prominence in the resolution of public questions. Thus, for private civic-servant participants, this recognition concedes, at least to some extent, a forceful intrusion activates the limited-purpose public figure, which is not the essence of civic responsibility.

Civic-duty participants are not all-purpose public figures—not only because they are not intimately involved in the resolution of important public questions or, by reason of their fame, shaping events in areas of societal concern,<sup>223</sup> but because the conditions around a controversy are weighed against this premise. The Supreme Court has not explicitly defined public controversy, but even in declaring what public controversy is not, there is no impact on the limited responsibil-

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220. *Gertz*, 418 U.S. at 351 (emphasis added).

221. *Id.*

222. See *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 166 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979); *Firestone*, 424 U.S. at 454.

223. *Gertz*, 418 U.S. at 336–37 (citing *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 162 (1967) (Warren, C.J., concurring)).

ities of civic-duty participants. According to *Gertz* and its progeny, their participation must be more than minimal.<sup>224</sup> In addition, the content, form, and context of a defamatory attack on civic-duty participants constantly delineates a remedy for this problem and cancels out an all-purpose public-figure determination. Below is a resuscitation of the same instances above, but here the specific circumstances are analyzed from the perspective of public-figure status.

### 1. *Routine Congressional Meetings/Hearings*

Participating in a routine congressional meeting or hearing does not render a private civic-duty participant a public figure. The methodology for participating in this type of civic involvement precludes one from interjecting into a vortex of controversy,<sup>225</sup> and absent a subpoena, it precludes one from being coerced into a controversy.<sup>226</sup> Civic-duty participants are not volunteering to take a position of potential public influence such that they are assuming a risk of injury.<sup>227</sup> By participating, they would be hard pressed to believe that their fleeting involvement would allow them the prestige to call a press conference for media redress in the case of a media controversy.<sup>228</sup> Because civic duties are limited in scope, civic-duty participants are unable to voluntarily inject, thrust, or draw attention towards their involvement in accordance with the *Gertz* requirements.

Categorizing a responsibility or activity at a congressional hearing for a civic-duty participant as beyond trivial or tangential participation is the only way to achieve a public figure classification, but it is not workable to relabel activities for this sole purpose. *Dun & Bradstreet* had problems defining public concern; to relabel this measurement of activity would catapult defamation law into a greater identity crisis. Although *Curtis Publishing Co. v. Butts* attempted to establish a formula to measure activity, it was in an ad hoc fashion to establish an end result of reclassifying a private individual to a limited-purpose public figure. If used today, this method would necessitate substantial proof showing that the civic-duty participant attempted to influ-

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224. *Gertz*, 418 U.S. at 352 (“[I]t is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual’s participation in the particular controversy giving rise to the defamation.”).

225. *See id.* at 344 (“[P]ublic figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”).

226. *Id.* at 345.

227. *See id.* (indicating those who assume the risk have “assumed roles of especial prominence in the affairs of society”).

228. *See id.* at 344 (“[P]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.”).

ence the outcome or realistically could have been expected to influence an outcome of a controversy. But this proof cannot be achieved with the limited responsibilities assigned to civic-duty participants. As it relates to congressional hearings, the witness rules cannot be materially altered to establish more than a fact-finding expedition amongst witnesses.

In spite of the potential newsworthiness of some congressional hearings, calumnious news reporting on routine congressional witnesses generally does not include assertions on subject matters that are within the context of public controversy.<sup>229</sup> The context of public controversy, drawn from *Dun & Bradstreet*, is required. In the instance where Rush Limbaugh made defamatory assertions, his conclusions about the potential witness were not of public controversy or concern. He chose to take unreasonable inferences from Ms. Fluke's testimony to entertain his listening audience, increase ratings, and please sponsors.<sup>230</sup> This is the type of defamatory attack that was not free and robust debate on public issues or meaningful dialogue of ideas concerning self-government.<sup>231</sup> This particular interest, according to *Dun & Bradstreet*, warrants no special protection when the speech is wholly false and clearly damaging to Fluke's reputation.<sup>232</sup> Limbaugh directly defamed a civic-duty participant who was not necessarily at the center of a public controversy. His goal, in making inferences from her speech, did not regard public controversy and, therefore, his attack was towards a private individual, not a public figure.

In analyzing the content of the published information and the weight to be applied, conflicting interpretations also preclude civic-duty participants who are involved in routine congressional hearings from being classified as public figures for several reasons. First, conflicting interpretations about the involuntary public figure status, rec-

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229. *See* *Time, Inc. v. Firestone*, 424 U.S. 448, 454–55 (1976) (“Dissolution of a marriage through judicial proceedings is not the sort of ‘public controversy’ referred to in *Gertz* . . . . Her actions, both in instituting the litigation and in its conduct, were quite different from those of General Walker in *Curtis Publishing Co.* . . . . She assumed no ‘special prominence in the resolution of public questions.’” (quoting *Gertz*, 418 U.S. at 351)).

230. *See* John Nolte, *Left-Wing Politico Busted Fudging Limbaugh Ratings*, FOX NATION (May 24, 2012), <http://nation.foxnews.com/rush-limbaugh/2012/05/24/left-wing-politico-busted-fudging-limbaugh-ratings>, archived at <http://perma.unl.edu/48YT-KXR9> (showing Arbitron ratings provided by an industry source); *see also* *Rush Limbaugh vs. Sandra Fluke*, *supra* note 5 (discussing Limbaugh's online public apologies where approximately forty-five advertisers withdrew from his radio talk show as sources).

231. *See* *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985).

232. *Id.* at 762 (“[T]his particular interest warrants no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's business reputation.”).

ognized in *Gertz*, necessitate that the designation of involuntary public figures leads inevitably to considerations of the nature of the content of the communication.<sup>233</sup> This inference legitimizes involuntariness as an option for valuable consideration. Although this status was immediately shunned after it was mentioned in *Gertz*, the reality exists that involuntary public figures become public figures through no purposeful action of their own. But this determination cannot be made without considering the content of the communications. Accordingly, when Rush Limbaugh called Fluke “a slut” and a “prostitute,” the content of his harmful, sensational reporting was not about the Oversight and Government Reform Committee barring a witness on the subject of women’s rights. On the contrary, the content was a vociferous and inappropriate use of language based on no purposeful act of Fluke’s to warrant the defamation. The weight of the foul language cannot be applied to any public concern.

The second reason why the content and weight of calumnious news reporting cannot be applied to a public figure status for civic-duty participants is because these communications lack the content, form, and context required by *Dun & Bradstreet*. This case relied on precedent that defined public concern “by [the expression’s] content, form, and context . . . as revealed by the whole record.”<sup>234</sup> In examining the public-concern inquiry as a threshold precondition, the content of calumnious news reporting is generally insignificant to the parameters of the actual public controversy. In the Fluke incident, the parameter of requiring Catholic universities and charities to include birth control in their health coverage was the actual controversy. Yet, Limbaugh’s form of speech was of malicious composition, and parts of the discourse that surrounded his words constituted defamation per se.<sup>235</sup> His intent was solely motivated by the desire for profit,<sup>236</sup> and more importantly, to advance the voice of the conservatives listening to his syndicated radio news talk show.<sup>237</sup> Thus, the content and weight of

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233. See King, *supra* note 20, at 672 (arguing that “[t]he involuntary public figure classification has contributed to the reemergence of content-based analysis” because “an alleged defamatory statement must relate to a public controversy . . . [t]hat necessarily leads to considerations of content”).

234. *Dun & Bradstreet*, 472 U.S. at 761 (citing *Connick v. Myers*, 461 U.S. 138, 147–48 (1983)).

235. RESTATEMENT (SECOND) OF TORTS § 569 (1977); see also Lisa R. Pruitt, “On the Chastity of Women All Property in the World Depends”: *Injury from Sexual Slander in the Nineteenth Century*, 78 IND. L. J. 965 (2003) (discussing conceptions of harm associated with defamation law, particularly in sexual slander cases).

236. See *Dun & Bradstreet*, 472 U.S. at 762 (indicating the speech, “like advertising, is hardy and unlikely to be deterred by incidental state regulation” because “[i]t is solely motivated by the desire for profit, which, [the Court] noted, is a force less likely to be deterred than others”).

237. LIMBAUGH, *supra* note 27, at 303 (“I am convinced that the most important thing conservatives have to do to win is to just keep saying no to the left. No to their

his calumnious news reporting does not impact the civic-duty participant's status when viewed from an involuntary public figure standpoint, nor any other public figure standpoints.

For the reasons stated above, civic-duty participants testifying in routine congressional hearings and meetings are not public figures. Courts, left with their own interpretation of the nature of the content, would deny public-figure status to these participants based on a formula that would balance the nature of the civic responsibility with the present legal rubric of defamation. The calumnious news reporting must be significant to the parameters of a public concern and the role of the civic-duty participant. Without the calumnious news reporting being germane to the civic responsibility, and with the lack of voluntarily injection and a more than trivial involvement, most courts would be obligated to reject such a classification.

## 2. *Jury Service*

Jurors who do not recoil from the responsibility of civic duty upon receiving a jury summons are not public figures. Similar to civic-duty participants providing congressional testimony, there is no general public concern inherent to a routine trial, nor do jurors voluntarily inject themselves into a particular public controversy.<sup>238</sup> They, like the plaintiff in *Firestone*, are not public figures as a result of being participants in litigation.<sup>239</sup> In fact, they are figures less public than the parties to the litigation because they were drawn into the legal forum by a jury summons and the voir dire process.<sup>240</sup> While they have or can be expected to have a major impact on the resolution of a specific trial with foreseeable and substantial ramifications for others,<sup>241</sup> they are neither the central figures in a significant public controversy, nor did they seek to publicize their views on the relevant controversy.<sup>242</sup>

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special-interest giveaways. No to their pork-barrel spending projects. No to their privileged congressional empire. If we can just deny them the fuel that runs their corrupt empire, it will wither away just like the communist empire did.”).

238. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) (indicating that one can become a public figure for a limited purpose if one “voluntarily injects oneself or is drawn into a particular public controversy”).

239. *Time, Inc. v. Firestone*, 424 U.S. 448, 457 (1976).

240. See *id.* (“[W]hile participants in some litigation may be legitimate ‘public figures,’ either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others.”).

241. See *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir. 1980) (defining public figure for limited purposes).

242. See *Gertz*, 418 U.S. at 351 (requiring special prominence in the resolution of public questions); see also *Wells v. Liddy*, 186 F.3d 505, 539–40 (4th Cir. 1999) (indicating the defendant must put forth evidence that the plaintiff has been the

Both an unconventional and conventional analysis is needed when examining calumnious news reporting on jurors, who are members of a small group. The unconventional analysis, notwithstanding the appearance of a right-of-privacy analysis, consists of understanding the rationale of protecting jurors' status as private persons. Some courts used this rationale in weighing the public controversy in denying a motion to release names and addresses of jurors to the press to prevent reasonably foreseeable defamatory publications.<sup>243</sup> In *United States v. Wecht*,<sup>244</sup> an acclaimed forensic pathologist was indicted, and local television stations and newspapers covered the execution of the warrants.<sup>245</sup> The pathologist asserted his indictment was "drafted as much for media attention as legal merit" and that the U.S. Attorney "personally contributed to the extensive media exposure by calling a highly unusual press conference which was widely attended by the media."<sup>246</sup> An ancillary dispute occurred in this case, however, when the Board of Judges for the Western District of Pennsylvania entered an administrative order directing that all jurors be identified in court only by assigned juror numbers, and all juror lists generated would be deemed confidential property of the Court.<sup>247</sup> This order activated an appeal to the Third Circuit.<sup>248</sup> The lower court's position measured the weight of the potential public controversy over the release of names and addresses of jurors. It was believed by the Board of Judges that the press would disseminate news stories that would negatively impact the jurors' willingness to serve and hinder their inability to remain fair, impartial, and focused on the case.<sup>249</sup>

Although the unconventional analysis in *Welch* was made prior to the vast, sensational calumnious news reporting by the 24-hour news media of today, the rationale of the trial court is consistent with the need to protect jurors. Nevertheless, the Third Circuit held that when contrasted with the media's First Amendment right to access to trial proceedings, the lower court must be able to show "that denying the names and addresses of jurors outweighs the value of openness."<sup>250</sup>

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regular focus of media reports to prove that the plaintiff is a central figure in the controversy).

243. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 68 (1971) (Harlan, J., dissenting), *abrogated by* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) ("[I]nfliction of harm through the exercise of freedom of speech and the press to which the Constitution gives explicit protection, recoverable damages must be limited to those consequences of the publication which are reasonably foreseeable.").

244. 537 F.3d 222 (3rd Cir. 2008).

245. *Id.* at 224–25.

246. *Id.*

247. *Id.*

248. *Id.* at 226.

249. *Id.* at 264 (J. Van Antwerp, concurring in part and dissenting in part).

250. *Id.* at 263 (J. Van Antwerp, concurring in part and dissenting in part) (citing *Press-Enterprise I*, 464 U.S. 501, 509 (1984)).

In spite of the ruling, judges in various jurisdictions faced with the same dilemma rely on the same argument: protect the jury when defamatory injury is foreseeable. They believe that in releasing vital information of jurors, an alternative consequence may occur; therefore, they delay the release of information until the public controversy becomes stale.<sup>251</sup> The reasonably foreseeable theory temporarily prevents jurors from being treated like public figures. It protects jurors from potential harm after weighing the public controversy over releasing the names and addresses of jurors with the consequences of defamatory publications. Therefore, it maintains the private individual classification as long as possible.

While some debate continues to brew as to whether the right to access names and addresses of jurors is privileged by the media, an affirmative response does not alter their status from private persons to public figures. The Supreme Court has held that the right of media access to jurors' names is not absolute; courts may apply restrictions to protect their overriding interests.<sup>252</sup> The State's justification in denying access must be a weighty one.<sup>253</sup> For example, in cases in which preverdict access to jury information is considered, a restriction on access may be granted only if the restriction is: (1) necessitated by a compelling government interest, and (2) narrowly tailored to serve that interest.<sup>254</sup> In cases where postverdict access to the names and addresses of jurors is sought, two competing interests are generally asserted in opposition to access: (1) the jurors' right to privacy and freedom from media harassment after the conclusion of their service; and (2) the concern that freedom of debate and independence of thought central to impartial jury deliberations will be stifled if jurors know their individual arguments and ballots might be disclosed by fellow jurors contacted by the media.<sup>255</sup> However, in either instance, if it is determined that the rights of the jurors' information does not over-

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251. Order Granting in Part Motion to Intervene for the Limited Purpose of Seeking Release of Juror Information Once Jury Is Discharged, *State v. Anthony*, No. 2008CF015606, 2011 WL 3112070 (Fla. Cir. Ct. July 26, 2011).

252. See Robert Lloyd Raskopf, *A First Amendment Right of Access to a Juror's Identity: Toward a Fuller Understanding of the Jury's Deliberative Process*, 17 PEPP. L. REV. 357, 374 (1990) (highlighting that this is the case even when a first amendment right of access is found to exist).

253. See *Globe Newspaper Co. v. Superior Court for Norfolk Cnty.*, 457 U.S. 596, 606 (1982) ("[T]he circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one.").

254. *Id.* at 606–07.

255. Raskopf, *supra* note 252, at 375 (citing Note, *The First Amendment and Post-Verdict Interviews*, 20 COLUM. J.L. LAW & SOC. PROBS. 203, 231–33 (1986); Public Disclosures of Jury Deliberations, 96 HARV. L. REV. 886, 888–92 (1983)).

ride the qualified First Amendment right of access,<sup>256</sup> it can be straightforwardly asserted that there is no lack of a free, uninhibited, robust, and wide-open debate when calumnious news reporting is imminent. Although not the strongest argument, an alternative may include some reasonable safeguarding to preserve the human dignity of victims of the calumnious speech.<sup>257</sup> This action treats jurors as private individuals and not as public figures.

The prevention of intrusion on jurors has also continued to be seen in high profile and televised criminal cases in America. In the infamous cases *State v. Anthony* and *State v. Zimmerman*, the judges believed the local and national media organizations that gave the case so much attention would likely seek out those jurors.<sup>258</sup> Recalling the incidents after the *Anthony* trial,<sup>259</sup> the judge in *Zimmerman* ruled that jurors' identities would be kept secret for an undetermined period with a subsequent decision to be made as to when their names could be made public.<sup>260</sup> Not only did the defense attorney ask to extend the anonymity,<sup>261</sup> the judge believed it was an inherent duty to protect court participants, especially those participating because of civic duty rather than voluntarily.<sup>262</sup> Specifically, this local court made a determination that the jurors, as a whole, were still private individuals. Prior to this case, the judge in the *Anthony* trial ordered a delay in releasing the names of the jurors and condemned the media. He said the broadcast of the *Anthony* trial "devolved into cheap, soap opera-like entertainment" and the Florida Public Records Law had "become

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256. See *Press-Enter. Co. v. Superior Court of California for Riverside Cnty. (Press-Enterprise II)*, 478 U.S. 1, 9 (1986) ("[T]he trial court must determine whether the situation is such that the rights of the accused override the qualified First Amendment right of access.").

257. *Id.* at 9–10 (citing *Press-Enterprise I*, 464 U.S. 501, 510 (1984)) ("[T]he presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.")

258. Amy Pavuk & Anthony Colarossi, *Anthony Jurors Unreachable After Names Made Public*, ORLANDO SENTINEL, Oct 25, 2011, at A4; Yamiche Alcindor, *Judge: Zimmerman Jurors' Names to Stay Secret for Now*, USA TODAY, June 17, 2013, <http://www.usatoday.com/story/news/2013/06/17/george-zimmerman-hearing-continues-monday/2432571/>, archived at <http://perma.unl.edu/U5ZF-Y5QN>.

259. Pavuk & Colarossi, *supra* note 258 (indicating the judge recalled that many, if not all, people were outraged and distressed by the verdict, and were not hesitant to show their contempt for the jurors).

260. *Id.* See Order Granting in Part Motion to Intervene for the Limited Purpose of Seeking Release of Juror Information Once Jury Is Discharged, *supra* note 251.

261. Rene Stutzman, *Will Jurors in Zimmerman Trial Remain Anonymous? It's Possible*, ORLANDO SENTINEL, July 14, 2013, at A4.

262. Order Granting in Part Motion to Intervene for the Limited Purpose of Seeking Release of Juror Information Once Jury Is Discharged, *supra* note 251.



simply a tool to sell a story.”<sup>263</sup> In fact, he took the position that “the Legislature must examine whether an exemption barring release of jurors’ names, albeit limited to specific, rare cases, is needed in order to protect the safety and well-being of those citizens willing to serve.”<sup>264</sup>

The matter of defaming jurors, who are members of a small group, also warrants a conventional defamation analysis of the expression’s content, form, and context as revealed by the whole record. This conventional analysis precludes members of a jury, as a whole, from being classified as public figures. As mentioned above, serving as a juror is a voluntary undertaking summoned by an involuntary procedure, and for defamation purposes, the status of a jury cannot be assessed without considering the content of the defamatory communications. In considering the content in the Nancy Grace incident, it cannot be said that her calumnious news reporting involved the free flow of commercial information. The defamatory comment did not ensure “uninhibited, robust, and wide-open debate” on public issues.<sup>265</sup> The content, form, and context of her statement that the jury was “kooky” served only to defend her reporting practices and, therefore, was not relevant to the merits of the trial, which was the public controversy. Because the calumnious statement involved no issue of public concern, the approach approved in *Gertz* and the balance of the state’s interest in compensating private individuals for such harm is in favor of the jury, but not as public figures.

Moving from the unconventional and conventional analyses, another reason why jurors are not public figures when subjected to calumnious news reporting is that the mandatory public voir dire proceedings in the jury selection process, although on public record, prevent such a designation. One may argue that the coercion factor in *Gertz*, causing one to become a public figure for a limited purpose, is evident in the voir dire process, thereby drawing one into a particular public controversy.<sup>266</sup> Admittedly, during the voir dire process, the venire member is forced, under the government’s threat of contempt of court, to publically reveal private matters.<sup>267</sup> Venire persons are

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263. *Id.* at 10–11.

264. Pavuk & Colarossi, *supra* note 258.

265. *See id.*

266. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974).

267. *See* Clinton T. Speegle, *The Socially Unpopular Verdict: A Post-Casey Anthony Analysis of the Need to Reform Juror Privacy Policy*, 43 CUMB. L. REV. 259, 269 (2013) (“[T]he venire-member is forced to publically reveal ‘[his] darkest moments, which [he] may have struggled for years to forget.’”) (quoting Order Granting in Part Motion to Intervene for the Limited Purpose of Seeking Release of Juror Information Once Jury is Discharged, *supra* note 251).

somewhat powerless against this privacy invasion.<sup>268</sup> However, this type of coercion alone is insufficient to propel the potential juror into a limited-purpose public-figure classification. A further reading of *Gertz* precludes this from occurring. *Gertz* makes clear that playing a minimal role precludes a defamed plaintiff from becoming a public figure.<sup>269</sup> Therefore, jurors who are subject to a system that could only identify or disqualify them for service in a public trial are not public figures because of their minimal role in the process.

In the Nancy Grace incident, the weight of the calumnious news reporting did not reclassify the jury from private persons to public figures. Nancy Grace was asked by a news broadcast host about her coverage tactics on the *Anthony* trial.<sup>270</sup> Her response appeared to be motivated by a personal desire to defend her reporting tactics,<sup>271</sup> not as speech significant to the parameters of the actual trial. Calling a jury “kooky” in this manner revealed that the defamatory statement was not major to the controversial aspects of the trial. In view of the fact that she said that she would take the heat for her media coverage tactics, and the “kooky” jury would not stop her for looking for missing children and trying to solve unsolved homicides,<sup>272</sup> her linguistic form was to use the word “kooky” as an adjective denoting an informal or slang term for a mentally irregular person.<sup>273</sup> The content of her entire communications was not of public concern, but in fact resembled mockery, while the broader parts of the discourse that surrounded her entire statement resembled resentment towards the news broadcast host who challenged her reporting style. The communications, as a whole, neither sought to inform the public that the jury was not discharging its civic responsibilities, nor “brought to light actual or potential wrongdoing or breach of public trust.”<sup>274</sup> Therefore, the jurors in the *Anthony* case do not qualify for a public figure classification.

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268. *Id.* (“[V]enire persons are powerless against this privacy invasion.”); *but see* *Brandborg v. Lucas*, 891 F. Supp. 352, 360 (E.D. Tex. 1995) (“[A]t voir dire the court should put the juror on notice concerning their right to non-disclosure of private matters.”).

269. *Gertz*, 418 U.S. at 352.

270. *Nancy Grace Discusses Casey Anthony Trial Verdict*, *supra* note 15.

271. *Id.* (“George, I tell the truth. Am I taking the heat for it? Yeah. Is that gonna make me stop looking for missing children and trying to solve unsolved homicides? No. I’m not going to let some kooky jury stop justice. Not for me anyway.”)

272. *Id.*

273. *Kooky*, THEFREEDICTIONARY.COM, <http://www.thefreedictionary.com/kooky> (last visited January 18, 2014), *archived at* <http://perma.unl.edu/KJL9-ZDSK> (last visited January 18, 2014).

274. *See* Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L.Q. 529, 535 (1998) (indicating the question of whether a defendant’s speech addresses a matter of public concern “must be determined by the content, form, and context of a given statement” and can be proven by the test that requires the

Because jurors cumulatively play a political function in the administration of the law,<sup>275</sup> it is fundamental that they be protected as private individuals from certain intrusions. Although not generally persons of notoriety, jurors serve to communicate the spirit of justice to the minds of all citizens.<sup>276</sup> This spirit is what the Supreme Court acknowledged when it said: “maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with utmost care.”<sup>277</sup> Although there has also been constitutional debate on whether jurors are protected from the press having access to their names, identities, and addresses,<sup>278</sup> this argument furthers the conclusion that they are not public figures. This fundamental need to protect jurors as a group recognizes a societal interest involving the rights of private individual citizens to serve as jurors,<sup>279</sup> without exposure to calumnious news reporting.

### 3. Inconsequential Political Engagement

When one voluntarily thrusts oneself into political engagement, in the manner that public officials and public figures do, he or she accepts the necessary consequences of that involvement in the public affairs.<sup>280</sup> However, when an individual voluntarily participates in political engagement in a manner that is inconsequential, like voting

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comment to seek to “inform the public that [the defamed person] was not discharging its governmental responsibilities,” nor “bring to light actual or potential wrongdoing or breach of public trust”).

275. See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (emphasis added) (quoting *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

276. Taslitz, *supra* note 211, at 474.

277. Tom M. Dees, III, *Juries: On the Verge of Extinction? A Discussion of Jury Reform*, 54 SMU L. REV. 1755, 1757 (2001) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959)) (internal quotation marks omitted). See also Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 676 (1918) (explaining how during the 18th century treatises extolling the jury “as a bulwark of liberty, as a means of preventing oppression by the Crown” were common in both England and America).

278. See Scott Sholder, “What’s in a Name?: A Paradigm Shift from Press-Enterprise to Time, Place, and Manner Restrictions When Considering the Release of Juror-Identifying Information in Criminal Trials, 36 AM. J. CRIM. L. 97, 99 (2009) (writing on the ongoing conflict that arises when the press seeks to obtain the identities and addresses of jurors in a criminal trial).

279. See John A. Wasleff, *Lockhart v. McCree: Death Qualifications as a Determinant of the Impartiality and Representativeness of a Jury in Death Penalty Cases*, 72 CORNELL L. REV. 1075, 1080 (1987) (“[T]he reference to ‘a phase of civic responsibility’ suggests that the definition of a ‘distinctive group’ is grounded partly in a societal interest involving the rights of citizens to serve as jurors.”).

280. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344–45 (1974) (indicating when an individual who voluntarily thrusts himself into the public arena, in the manner that public officials and public figures do, he must accept the necessary consequences resulting from involvement in public affairs).

or participating in political debates for a question-and-answer session, they are not subject to the category of all-purpose public figures. Such activities only render the political engagement an activity that dissipates when the entire political outcome is complete even though it was an activity that may have been necessary to help the political process develop. The mere attempt to designate persons who incidentally engage in limited political interaction as public figures forges confusion about the designation itself and on the disjointed public-concern definition or lack thereof. Clear evidence of the elements of public-figure requirements is crucial to public-figure status, but without such evidence, the activity must be considered inconsequential political engagement.

Fleeting participation in political activities precludes private civic-duty participants from existing within the parameters of the public figure category. The nature and extent of activities by a political candidate or chairman of a political party in public political affairs requires one to interject oneself or be drawn into potential public controversy.<sup>281</sup> Robust as they are, political campaigns are generally public controversies. But deeds that dissipate cannot meet the requirement of “thrust” because fleeting participation does not rise to the level of assuming special prominence in the resolution of public questions. More importantly, when a civic-duty participant asks questions at a political debate, such persons are not accepting the risk of injury by defamatory falsehood as defined in *Gertz*.<sup>282</sup> This private civic-duty participant has relinquished no part of his interest in the protection of his own good name.<sup>283</sup>

Civic-duty participants are also not public figures even if it is alleged they were coerced to participate in trivial or fleeting political activities. Trivial or fleeting political activities do not, under *Gertz*, amount to a coercion or drawing in of the civic-duty participant into a particular public controversy. Generally, others do not force participation in these dissipating, minimal functions at political events through pressure, threats, or intimidation.<sup>284</sup> The participation is usually in response to a high value on civic responsibility.<sup>285</sup> But, even if it is

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281. *Id.* at 351.

282. *Id.* at 345 (“[C]ommunications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual [who has] not accepted public office or assumed an ‘influential role in ordering society.’” (quoting *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 164 (1967))).

283. *Id.*

284. *Coerce*, THEFREEDICTIONARY.COM, <http://www.thefreedictionary.com/coerce>, archived at <http://perma.unl.edu/V2XG-FEZL> (last visited January 25, 2014) (defining *coerce* as: “To force to act or think in a certain way by use of pressure, threats, or intimidation; compel”).

285. See Alarcón, *supra* note 23.

alleged and proven that the concept of civic responsibility is propaganda to brainwash citizens, the activities cannot alter a private individual status. This is because, similar to the discussion of jurors, Gertz emphasized that a minimal function does not equal public figure designation.<sup>286</sup>

In balancing dissipating and incidental political engagement with the designation of public figure status, a clear perception of public concern and the nature of the defamatory content conclude that private civic duty participants are not eligible for the category. In the instance of the calumnious news reporting of the *Washington Free Beacon*, the public controversy was between opposing candidates. In fact, the contention between the candidates during the second debate was based on past controversies between them regarding key issues.<sup>287</sup> The civic-duty participant's input in the question-and-answer debate was neither germane to the ongoing political controversy, nor was it the basis of a primary controversy.<sup>288</sup> Simply put, her question was one that was not previously mentioned in the first debate.<sup>289</sup> According to one circuit court's requirement,<sup>290</sup> the controversy must have actually arisen.<sup>291</sup> Here, the calumnious news reporting was directed toward a private person without a preexisting public controversy relating to her question. What ultimately drew attention was not her question<sup>292</sup> but, rather, the Republican candidate's response, which immediately ignited uproar on social media forums and in the press,<sup>293</sup> creating a second public controversy.

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286. Gertz, 418 U.S. at 352.

287. Tom Cohen, *Romney Takes Debate to Obama over Economy, Health Care*, CNN (Oct. 4, 2012, 12:17 AM), <http://www.cnn.com/2012/10/03/politics/debate-main>, archived at <http://perma.unl.edu/BP5F-JXNX>.

288. *2nd Presidential Debate*, STUDENT NEWS DAILY (Oct. 18, 2012), <http://www.studentnewsdaily.com/daily-news-article/2nd-presidential-debate/>, archived at <http://perma.unl.edu/EXM8-PAUV> ("In what new ways do you intend to rectify the inequalities in the workplace, specifically regarding females making only 72 percent of what their male counterparts earn?").

289. *October 3, 2012 Debate Transcript*, *supra* note 214 (indicating the questions asked and a description of the debate on domestic issues: three on the economy and one each on health care, the role of government and governing, with an emphasis throughout on differences, specifics and choices).

290. *Waldbaum v. Fairchild Pub.*, 627 F.2d 1287 (D.C. Cir. 1980).

291. *Wells v. Liddy*, 186 F.3d 505, 540 (4th Cir. 1999) ("A public controversy must have actually arisen that is related to, although not necessarily causally linked, to [sic] the action. The involuntary public figure must be recognized as a central figure during debate over that matter.").

292. See Matt Viser, *Putting 'Binders' in Context; Romney Pushed to Recruit Women at Group's Behest*, BOSTON GLOBE, October 18, 2012, <http://www.highbeam.com/doc/1P2-33776017.html>, archived at <http://perma.unl.edu/3T6T-4SYR> (asking about inequities in the workplace, with females often earning less than their male counterparts).

293. See Carla Marinucci, *'Binders' Quote Ignites Furor on Social Media*, HOUSTON CHRONICLE, Oct. 18, 2012, <http://www.chron.com/news/politics/article/Binders-re>

When the original intent of a news article is to censure a cause or public concern and the calumnious news reporting about a civic-duty participant is incidental to the story, this alone does not make the civic-duty participant known as a central person to the activity.<sup>294</sup> Once again in the *Washington Free Beacon* incident, prior to the Republican candidate's statement there was no specific public dispute involving Fenton that had foreseeable and substantial ramifications for persons beyond the civic-duty participant herself.<sup>295</sup> She did not publicize her views about the presidential candidates. In fact, at the time she asked the question the public controversy over the candidate's response, as identified by the *Washington Free Beacon*, had not actually happened. Her question only set off a response that created a new focus about the political candidate for voters to assess. The calumnious news reporting about her personal attributes, which were taken out of context, were not relevant to the prior controversy between the political candidates. Her incidental political engagement was not central to the candidates' views, as they articulated them before she asked the question. For that reason, she is not a public figure.

Knowing that essentially private concerns or disagreements do not become public controversies simply because they attract attention,<sup>296</sup> the next step in determining that private civic-duty participants are not public figures is to evaluate the content of the defamatory speech. Whether the calumnious news report about the civic-duty participant addresses matters of public concern must be determined, although the participation is a fleeting activity in political affairs.<sup>297</sup> Because calumnious news reporting includes deleterious comments, denigrating expressions, indecent words, and defamatory statements, these categories of statements generally do not involve issues of public concern. Comparatively, in the *Washington Free Beacon* incident, imparting

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mark-ignites-furor-on-social-media-3958155.php, archived at <http://perma.unl.edu/VEA9-9PFX> (reporting Republican presidential candidate Mitt Romney's comment during Tuesday's presidential debate about gathering "BINDERS FULL of WOMEN" for possible hires when he was the governor of Massachusetts spiraled into the social media stratosphere within minutes); cf. Rohter, *supra* note 14 (reporting on the Joe the Plumber incident when Joe Wurzelbacher, just another working man, stopped presidential candidate Barack Obama during a political rally, caused the presidential candidate to make a controversial statement, set himself on a path to becoming America's newest media celebrity—and as such suddenly found himself facing celebrity-level scrutiny).

294. See *Wells*, 186 F.3d at 540 (indicating that a public controversy must have actually arisen that is related, although not necessarily causally linked, to the action and the involuntary public figure must be recognized as a central figure during debate over that matter).

295. See *Waldbaum*, 627 F.2d at 1292 (defining aspects of public concern).

296. *Waldbaum*, 627 F.2d at 1296–98.

297. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (citing *Connick v. Myers*, 461 U.S. 138, 147–48 (1983)).

facts out of context to fabricate an untrue assertion is speech of denigrating expressions, not of public concern. So, by analysis, *Dun & Bradstreet*'s adoption of a "public interest or concern" requirement, indistinguishable from the "public or general interest" test formulated in *Rosenbloom*—the very test that *Gertz* was expressly meant to supplant<sup>298</sup>—was based on the reasoning that defamatory statements that do not involve issues of public concern yield a less compelling First Amendment interest.<sup>299</sup> In this manner, *Dun & Bradstreet* gives calumnious news reporters less First Amendment protection than they enjoyed under either the *Rosenbloom* plurality or *Gertz*,<sup>300</sup> and leaves civic-duty participants in a better position to maintain the private-person status and demand a remedy.

The Shirley Sherrod instance discussed above also failed to show clear evidence of general fame or notoriety in the community and pervasive involvement in the affairs of society that would deem her a public personality for all aspects of her life. Her employment in the governmental office is not sufficient enough to label her an all-purpose public figure. She does not meet the test that requires her position in government to be of such apparent importance that the public has an independent interest in the qualifications and performance beyond the general public interest in all governmental employees. Additionally, such a conclusion fails a *Gertz* examination. *Gertz* holds that it is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation. In this instance, the NAACP fund dinner was not surrounded by controversy at the time she gave the speech. Without first having a controversy, the nature and extent of her giving a speech is not deserving of an analysis in the defamation claim. Her status as a private individual is not altered because it was not derived from speech involving the affairs of society in the context of notoriety.

Whether creating a controversy by misusing video editing or social media as a source for calumnious news reporting or directly making defamatory statements about civic-duty participants involved in political activities, the status of the participant is not altered. When the unnamed author of the *Washington Free Beacon* article termed his investigative reporting skills a "study" of the victim's personal Twitter account,<sup>301</sup> he did not change the *Gertz* classifications nor did he

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298. Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 11–12 (1990).

299. *Dun & Bradstreet*, 472 U.S. at 757–58.

300. *Estlund*, *supra* note 298, at 55 n.65.

301. See *Washington Free Beacon Staff*, *supra* note 47. This technique, although innovative, allows for the media or other speakers to take tweets or posts out of context, presumably in the hopes of calling the credibility of the targeted person into question. See *Stafford*, *supra* note 14.

change the public controversy standards set by the progeny of *Gertz*. The same is applicable for video editing done to manufacture a story. For civic-duty participants simply engaging in a dissipating or fleeting civic responsibilities in political affairs, the court is clear that the existence of a public controversy—and the plaintiff's central role with it—is essential even with some recognition of status.<sup>302</sup> And it makes no difference that it was an activity that may have been necessary to help the political outcome develop.

### C. Civic-Duty Participants are Private Individuals

Private civic-duty participants are private individuals for purposes of defamation and are afforded the opportunity to seek legal redress when they are faced with calumnious news reporting. *Gertz* and its progeny presented this conclusion by reasoning that defamatory statements do not materially advance society's interest in "uninhibited, robust, and wide-open" debate on public issues.<sup>303</sup> The instances of calumnious news reporting illustrated above clearly demonstrate no potential interference with a meaningful dialogue of ideas concerning self-government. Therefore, the media does not have First Amendment protection when it reports calumnious news stories that assault a civic-duty participant as they participate in dissipating responsibilities especially when and the original intent of the news article is actually to censure another cause or public concern. The resultant behavior warrants compensation particularly because the consequences of calumnious news reporting abandons civic-duty participants as collateral damage although they have not relinquished any part of their interest in the protection of their own good name.<sup>304</sup>

#### 1. Routine Congressional Meetings/Hearings

In determining that an individual should not be deemed a public personality for all aspects of his or her life,<sup>305</sup> Justice Powell, in *Gertz*, sought to prevent private persons from losing their status. For him, it was preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defama-

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302. See King, *supra* note 20, at 667 (indicating that the existence of a public controversy—and the plaintiff's central role within it—is essential even in the recognition of voluntary public figures).

303. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

304. See *Gertz*, 418 U.S. at 345 (indicating the plaintiff has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood).

305. *Gertz*, 418 U.S. at 352.



tion.<sup>306</sup> So, in the Fluke incident, Justice Powell would have agreed that evidence was lacking that she was cloaked in general fame or notoriety before she gave her testimony at a congressional meeting. Additionally, he would have determined that this civic-duty participant neither thrust herself into the vortex of a public controversy nor did she engage the public's attention in an attempt to influence its outcome.<sup>307</sup> Rather, he would say that Fluke played a minimal role and her participation related solely to her representation as a private individual.

According to *Firestone*, *Hutchinson*, and *Wolston*, private-person witnesses at congressional hearings do not meet the criteria for status change when importance is placed on the subject matter of the statement and the status of the defamed private civic-duty participant is devalued. Under these cases, theoretically, the primary task is to isolate the public controversy, then consider the civic-duty participant's involvement in it. A routine congressional meeting with testimony triggers no public controversy in spite of the newsworthiness regarding the reason for the hearing.<sup>308</sup> The civic-duty participant's involvement in it is not the primary weight to be placed on the matter; his or her role is secondary.

According to many statements of Supreme Court justices, the First Amendment to the United States Constitution does not protect deliberate, malicious character assassinations.<sup>309</sup> With the subject matter being so prevalent, according to the trilogy,<sup>310</sup> Limbaugh's statements instantly fall in that category of unprotected speech. Defamation of a private individual by the mass media is not one of the occasions for unfettered ad hoc balancing.<sup>311</sup> *Dun & Bradstreet* recognized defamatory speech as far more limited when the concerns that activated *New*

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306. *Id.*

307. *See id.* (indicating that the plaintiff played a minimal role at the coroner's inquest, his participation related solely to his representation of a private client, he took no part in the criminal prosecution of Officer Nuccio, he never discussed either the criminal or civil litigation with the press, he plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome).

308. *See Time, Inc. v. Firestone*, 424 U.S. 448, 454–55 (1976) (indicating that dissolution of a marriage through judicial proceedings is not the sort of "public controversy" referred to in *Gertz* . . . and her actions, both in instituting the litigation and in its conduct, were quite different from those of General Walker in *Curtis Publishing Co.*, and she assumed no "special prominence" in the resolution of public questions).

309. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 785 (1986) (Stevens, J., dissenting).

310. *See Firestone*, 424 U.S. 448 (1976); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979).

311. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 81 (1971). (Marshall, J., dissenting).

*York Times* and *Gertz* are absent.<sup>312</sup> In this case, *Dun & Bradstreet* adds, “[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press.”<sup>313</sup> Thus, according to *gratis dicta* from five justices and controlling precedent, when a private female civic duty participant is called a “slut” by the media, after members of Congress invited her to educate them on the importance of contraception for women under the new healthcare law, such harmful and sensational reporting does not advance society’s interest nor reverse her status.

## 2. *Jury Service*

Participating in a jury system does not change the private person status of private civic duty participants. From a defamation law perspective, the Restatement (Second) of Torts reads that jurors participate in judicial proceedings as a public duty.<sup>314</sup> So amalgamating the private person status of a jury serving a public duty with the individual interest of the speaker precludes an analysis of general or public interest and the subsequent transformation of status. In the Nancy Grace incident, comparable to the holding in *Dun & Bradstreet*, defending herself to another reporter is excluded from matters of public concern because the speech was predominantly in the realm of matters of personal and economic concern.<sup>315</sup> Focusing primarily on the content of her statement, this speech involved a subject of purely private concern and does not relate to a matter of public importance thereby restricting the applicability of *Gertz*, which impacts matters of public or general importance.<sup>316</sup> For that reason it does not trigger the secondary analysis to considering altering the role of the civic-duty participant jurors.

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312. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (indicating the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent).

313. *Id.* at 760.

314. RESTATEMENT (SECOND) OF TORTS § 589 (1977) (indicating that a member of a grand or petit jury is absolutely privileged to publish defamatory matter concerning another in the performance of his function as a juror, if the defamatory matter has some relation to the proceedings in which he is acting as juror).

315. See *Dun & Bradstreet Inc.*, 472 U.S. at 787 (showing Justice Powell’s opinion excluded the subject matter of credit reports from matters of public concern because the speech was predominantly in the realm of matters of economic concern).

316. *Id.* at 774 (referring to the application of *Gertz* to deal with a matter of public importance).

### 3. *Inconsequential Political Engagement*

When private individuals accept government jobs, one may perhaps infer that their job duties or extra activities are synonymous with political engagement; however, this misconception does not initiate transformation of the private-individual status. *Gertz*, *Hutchinson*, and *Hepp* are examples of how mere employment or participation in a particular venture is not enough to alter a private person status.<sup>317</sup> Similar to the plaintiffs in these cases, Shirley Sherrod plainly neither thrust herself into the vortex of the public controversy, nor did she engage the public's attention in an attempt to influence its outcome when she gave a speech at the NAACP event. Rather, her functions were minimal as a guest speaker at an organization's lunch. Her private-figure status must be given carte blanche exclusion from the media's privilege. Thus, mere employment and a misconceived understanding of that position do not affect a private-person status.

Private civic-duty participants do not relinquish part of their interest in their own good name and their private-person status when they fulfill a civic responsibility. Generally, they do not voluntarily inject themselves into a particular public controversy; they simply step into areas of need to help facilitate government. They do not have available opportunities usually enjoyed by public officials to rebut defamatory comments.<sup>318</sup> Their contributions to society far outweigh the advancement to society's interest that calumnious news reporting offers. They have little individual or business interest in the offering of their time or service towards Congress, juries, or political engagements. However, when they are directly or indirectly attacked by calumnious news reporting, it is either for the business interest of the media or their specific news audience. Since this is not a meaningful dialogue of ideas concerning self-government, *Gertz* and its progeny allow for defamatory redress for civic duty participants to look like this:

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317. In *Gertz*, the plaintiff was a lawyer; in *Hutchinson*, the plaintiff was a research director and professor; and in *Hepp*, the plaintiff was the principal stockholder of General Programming, Inc. (GPI), a corporation that franchises a chain of stores.

318. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 362–63 (1974) (indicating that First Amendment values are of no less significance when media reports concern private persons' involvement in matters of public concern, but refusing to provide the same level of constitutional protection that has been afforded the media in the context of defamation of public persons because the private individual does not have the same degree of access to the media to rebut defamatory comments as does the public person).

Private individuals	Public Officials and Public Figures		
triggered when speech is wholly false and clearly damaging to the victim's business reputation, or triggered when speech solely in the individual interest of the speaker and its specific business audience	Involuntary public figures	All-purpose public figures	Limited-purpose public figures
	exceedingly rare instance	pervasive fame or notoriety for all purposes and in all contexts	voluntarily injects oneself or coerced but > a minimal role + assumed the risk and have access to "self-help"  triggered when the subject matter = public concern

V. CONCLUSION

The meaning of public interest and the discernible status of plaintiffs under *Gertz* and its progeny is not as blurred when a media privilege is asserted against defamation claims by civic-duty participants. Traditionally, this was usually the case, but defamation decisions—starting with *Gertz* and on to its progeny—made the task increasingly difficult once the plaintiffs status was beyond that of a public official.<sup>319</sup> In such a case, the reasons for the lack of complications are fourfold. First, civic-duty participants are usually implicated in matters that so narrowly dribble into the public interest or public concern that the privilege expanded by *Gertz* and its progeny are not applicable. Second, the public-figure classification and its unstructured constraints, particularly with respect to the public-figure subcategories, are not applicable to civic-duty participants who have not obtained pervasive fame or notoriety or who do not voluntarily thrust themselves into a public controversy and assume the risk, or when the subject matter is not of public concern. Third, although there has been little guidance by the Court in defining public controversy so as to serve as a funnel for all persons and situations, the direction on what

319. See King, *supra*, note 20, at 661 (indicating that the problem has come in the attempts by the Supreme Court and lower courts to delineate the scope of constitutional restrictions on defamation once we have passed beyond claims by public officials).

was *not* public concern and when the controversy must start excludes the dissipating activities of civic-duty participants. Fourth, evaluating the content of the speech usually results in a finding that calumnious news reporting does not help shape events in areas of concern to society at large. These four reasons solidify the private individual status of civic-duty participants. Therefore, private citizens who want to engage in civic responsibilities, by invitation or mandate, may seek legal redress against the media for calumnious news reporting ensuing from their participation because they are not public figures.